

G6RAACAJ1

Bench Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LUIS CAJAMARCA,

4 Plaintiff,

5 v.

15 CV 8244 (GHW)

6 AZEM HASANGJIKAJ, SEGUNDO
7 CALLE and YERINA RESTAURANT
8 CORP.,

Defendants.

9 -----x

10 New York, N.Y.
11 June 27, 2016
12 9:00 a.m.

13 Before:

14 HON. GREGORY H. WOODS,

15 District Judge

16 APPEARANCES

17 THE LAW OFFICE OF WILLIAM CAFARO
18 Attorney for Plaintiff
19 BY: AMIT KUMAR

20 NATE STRAND
21 Attorney for Defendants
22 BY: NATHANIEL L. STRAND
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1 THE COURT: You can be seated.

2 (Case called)

3 MR. KUMAR: Amit Kumar, Law Offices of William Cafaro,
4 for the plaintiff Luis Cajamarca.

5 With me at the table is Mr. Cajamarca, a translator,
6 and my paralegal, Nicholas Durand. I ask that Mr. Durand be
7 allowed to sit at the table in case the translator needs to be
8 excused for some reason, that way he can also act as
9 translator.

10 THE COURT: If he is a certified translator he could
11 act as a translator. Otherwise it is not apparent that me that
12 he is qualified. Is he a certified translator?

13 MR. KUMAR: No.

14 THE COURT: I hope that your translator will be able
15 to stay.

16 MR. KUMAR: Yes, your Honor.

17 THE COURT: Thank you.

18 MR. KUMAR: Thank you, your Honor.

19 MR. STRAND: Nate Strand, on behalf of the defendants,
20 your Honor.

21 THE COURT: Thank you. Good morning.

22 We're here to begin a bench trial in this matter. We
23 have had a comprehensive final pretrial conference, so I hope
24 that we'll be able to begin this trial promptly. Is there
25 anything that either of you would like to raise with the Court

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1 before we begin with the parties' opening statements?

2 Counsel.

3 MR. KUMAR: Nothing from the plaintiff, your Honor.

4 THE COURT: Thank you. Mr. Kumar.

5 MR. STRAND: Yes, your Honor. My sincerest apology.
6 My client is not here. I texted him repeatedly including last
7 night but he's running late. I guess the best way to deal with
8 this is a maybe take a short recess after the opening
9 statements so I can find him because my phone is downstairs.

10 THE COURT: Thank you. Yes, let's proceed.

11 What I will ask is that if you wish, Mr. Strand, you
12 could give your client's phone number to my court staff and
13 they can try to contact him during opening statements so that
14 some effort is being made to ascertain his whereabouts. If we
15 get him on the line we would immediately recess so that you
16 could talk with him. We would not discuss anything substantive
17 with him but I don't want the question of his whereabouts to be
18 weighing on you. Would that be an appropriate approach? What
19 other to alternatives would you suggest?

20 MR. STRAND: That is a beautiful approach. Thank you,
21 your Honor. Are you ready for the telephone number?

22 THE COURT: Thank you. You can hand it forward.

23 (Pause)

24 THE COURT: Good. Counselor, are we ready to proceed?

25 MR. STRAND: Yes, your Honor.

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1 MR. KUMAR: Yes, your Honor.

2 THE COURT: Good. Thank you very much.

3 Let's begin with the parties' opening statements. Let
4 me start with you if I can please, Mr. Kumar.

5 MR. KUMAR: Yes, your Honor. May I use the lectern?

6 THE COURT: Please do.

7 MR. KUMAR: Good morning and may it please the Court,
8 this case like all wage an hour cases is a case about
9 fundamental fairness, about the ideas set out in the wake of
10 the Great Depression. If an employee works over 40 hours in a
11 given week then he is entitled to more than his standard wages.
12 My client Luis Cajamarca is an immigrant who speaks limited
13 English. The defendants are adept businessmen who have
14 successfully navigated the notorious New York City restaurant
15 industry for over 20 years. As part of the running of their
16 business the defendants hired my client and have unfairly
17 denied him his overtime wages for hours he worked over 40 in a
18 given week.

19 Mr. Cajamarca was hired by the defendants as a pasta
20 man on April 25, 2014 and worked continuously in that position
21 until September 10, 2015. As a pasta man Mr. Cajamarca's main
22 duties included making pasta and grilling meats for defendants'
23 customers. When the kitchen closed at the end of the night
24 Mr. Cajamarca would clean his station and head home.
25 Throughout his employment with the defendants he worked the

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1 same weekly schedule. Every Tuesday and Thursday he worked
2 from 11:30 a.m. until ten p.m. Every Friday and Saturday he
3 worked from 3:30 p.m. until 12 a.m. and finally, every Sunday
4 he worked from 3:30 p.m. until 10 p.m. This amounts to 44 and
5 a half hours per week.

6 (Continued on next page)

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Opening - Mr. Kumar

1 MR. KUMAR: This amounts to 44 and a half hours per
2 week. For his labor Mr. Cajamarca was paid a flat salary of
3 \$700 per week. This consisted of a net payment of \$390 per
4 week via check and \$310 per check in cash. At no point did
5 anyone explain to Mr. Cajamarca that this salary was for any
6 overtime wages or for any overtime hours.

7 Now, I would like the Court to keep in mind that many,
8 but not all, of the facts that I have layed out are undisputed
9 by the parties in this action. Mr. Cajamarca and the
10 defendants agree upon many of the facts alleged in the
11 plaintiff's complaint, like his start date, his end date, the
12 fact that he was paid a salary instead on an hourly basis and,
13 lastly, that that salary amounted to \$700 net per week.

14 As far as the defendant's evidence, I have an
15 indication that they are basing their entire defense on
16 Mr. Hasangjikaj's best recollections of when Mr. Cajamarca
17 actually worked. They have not produced any documentation
18 concerning the exact number of hours Mr. Cajamarca worked and
19 relied only on the fact that they paid him on a salary basis
20 for their recordkeeping shortcomings.

21 At the end of the presentation of evidence the
22 plaintiff will be asking for what in fairness he deserves. He
23 will be requesting payment of the overtime wages he never
24 received, payment of any spread of hours wages, as well as any
25 other remedy that he is fairly entitled to under federal and

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Opening - Mr. Kumar

1 New York State law. Thank you.

2 THE COURT: Mr. Strand, let me turn to you.

3 MR. STRAND: Thank you, Judge. If I'm going too fast
4 for you all, just hold up your hand. I would hate to burden
5 our gracious staff here.

6 Mr. Kumar began his statement with this discussion of
7 fundamental fairness. I agree with that and I think we should
8 also be fair to all the parties in what we will accept as
9 sufficient proof of an overtime wage that was paid. Thus far
10 the testimony that was submitted in the direct testimony
11 affidavit was kind of vague. It was 31 words long as to the
12 hours. So I am going to ask some questions about that. Mr.
13 Kumar mentioned immigrants. I kind of chuckle because my
14 client, Mr. Hasangjikaj, who is also an immigrant, speaks
15 limited English, as you will see, if he hopefully gets here, my
16 hope is.

17 I also need to correct a misstatement in Mr. Kumar's
18 opening statement. He said 20 years. It's actually about 30
19 years, since the '80s the restaurant has been opened. And they
20 have never had a complaint, never a labor complaint, not one.
21 And this was indicated in Mr. Hasangjikaj's direct testimony.
22 After 30 years suddenly we decide to be shysters?

23 Anyway, as Mr. Kumar indicated, we do agree generally
24 with the scope of work. He said something about grilling
25 meats. I think he cooked pasta. He boiled, or whatever he

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Opening - Mr. Kumar

1 did. He cooked the ziti or the penne, whatever. I don't know
2 that he said he cooked meats. I don't know if it's a relevant
3 distinction, but I thought I would point that out.

4 As for him working the same schedule, we are going to
5 talk about a little bit in Mr. Hasangjikaj's direct testimony,
6 the scheduling is based on shifts. It's a restaurant and there
7 is a lunch shift and there is a dinner shift and they schedule
8 based on the shifts and to that extent Mr. Hasangjikaj agreed,
9 yes, he worked a certain number of dinners and a certain number
10 of lunches. I think he said one lunch. It was usually one
11 lunch and five dinners. And what he testifies to is that the
12 actual times fluctuate. For example, dinner shift starts at 5
13 and in the summertime it might be a little bit earlier, like 9
14 p.m. that the kitchen closes down, whereas in the winter it
15 might be as late as 10 or 11. He says it was a little later on
16 weekends, on Fridays and Saturdays, 10:30, 11. He said like on
17 Sundays the kitchen closed at 10. The schedule did fluctuate
18 to that extent and that makes sense when we are talking about
19 restaurants.

20 As far as the actual days, and this will get me into
21 the next point, there might be a disagreement. The 390 check
22 and the 310 cash, I believe that's correct, and Mr. Hasangjikaj
23 testified that that is what the plaintiff asked. He said he
24 wanted to be paid part on a 1099. I don't think it matters for
25 purposes of anything, but, yes, that's how he was paid.

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Opening - Mr. Kumar

1 As far as Mr. Kumar's statement that we are relying on
2 the best recollection of Mr. Hasangjikaj and that we don't have
3 any documentation, that's absolutely wrong. We do have
4 documentation. Bear with me. I disclosed pages and pages of
5 documentation and if you take a look at these, and we will look
6 at these and you can obviously look at them when you decide on
7 this case, if you look at these records you will see that they
8 don't always just say 40. Sometimes -- I'm looking at 40, 30.
9 I won't point to a specific page at this point. You can look
10 at it on your own time.

11 The first page he disclosed shows that they do keep
12 track of the shifts, and I think what Mr. Kumar is referring to
13 is something that Mr. Hasangjikaj said in his deposition, that
14 he said the records overstated the hours worked because when
15 you work six shifts and the shifts are from four to six hours,
16 that's at most maybe around 36 hours. They recorded it as 40
17 for recordkeeping purposes because he didn't dock their pay
18 when they got done at 9 instead of 10, instead of 11.

19 The other side of this case is using the fact that we
20 overreported their hours to say that the hours are not
21 accurate. Now, the hours are not accurate but in an irrelevant
22 way. The hours do reflect that no overtime was worked or the
23 records do reflect that, and he is sensitive to that. He says
24 in his direct testimony, I don't want to have to pay overtime
25 premiums because I can't afford it.

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Opening - Mr. Kumar

1 Anyway, I think this really -- anyway. And you can
2 see from the evidence produced, and this is an example of
3 cherry-picking. Mr. Kumar is probably going to maybe quote the
4 deposition where he said no, I didn't write that when he came
5 in, but his head waiter did. This is classic distortion of the
6 truth. He testified that his head waiter, Willie -- it's
7 spelled with a V. It looks like Vilson, but it's pronounced
8 Wilson -- did keep track of when the employees were working,
9 and you can see that from the picture that we produced, and
10 that makes sense because a business would want to know that
11 your employees are showing up to work. This statement that
12 it's only based on Mr. Hasangjikaj's recollection is not true.
13 We have demonstrated that we have a system to keep track of
14 when employees work and the shifts that they work, which days.
15 And Mr. Kumar is correct. We didn't record -- it's not a punch
16 clock. We don't say, he came at 5:02. But we did record the
17 shifts and put them in for purposes of payroll. We didn't
18 retain sheets. That's acceptable under federal regulations.
19 They say you can use checkmarks for a shift if you know what
20 the shift is.

21 Anyway, that goes to the exact number. These records
22 were inaccurate, Mr. Hasangjikaj said, to the extent they
23 overstated the hours. They are not inaccurate to the extent
24 they reflect that no overtime was worked. We will let the
25 testimony go forward.

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Opening - Mr. Kumar

1 The main points I want to focus on in the course of
2 this trial are, one, the direct testimony affidavit we got so
3 far was really vague, 31 words. It was qualified. It said to
4 my best recollections. Obviously, I would like to ask him
5 about that.

6 And there has also been some inconsistent
7 representations in this case. I'm not necessarily saying it
8 was the plaintiff. But, for example, the complaint said that
9 we didn't keep any records of the pay. Now he admits that he
10 got pay stubs. Anyway, that's an inconsistency and another
11 inconsistency in the complaint said that the head cook,
12 Mr. Segundo Calle, who was also a defendant here, was the one
13 who fired him.

14 Now the testimony, as you know, it was Mr. Hasangjikaj
15 who fired him. I am not saying that the plaintiff said that.
16 I don't know. Maybe it got lost in the shuffle or something.

17 Anyway, I'm looking forward to hearing Mr. Cajamarca,
18 his testimony, just asking him a few questions about this
19 because the testimony is very vague. I just want to clarify a
20 few points. It will not take long. That being said, thank
21 you, your Honor.

22 THE COURT: Thank you, Mr. Strand.

23 Mr. Kumar, would you please call your first witness.

24 MR. KUMAR: Plaintiff calls Luis Cajamarca.

25 LUIS CAJAMARCA,

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Opening - Mr. Kumar

1 the plaintiff, called as a witness on his own behalf,
2 having been duly sworn, testified as follows:

3 THE COURT: Before we proceed let me engage in a short
4 colloquy with the interpreter. Would you mind please just
5 confirming that you are federally certified interpreter.

6 THE INTERPRETER: Yes, your Honor. This interpreter
7 is certified by the United States Office of the Administrative
8 Courts, the Administrative Office of the United States courts.

9 THE COURT: And have you taken the oath to interpret
10 properly? If not, what I suggest is that Mr. Daniels swear you
11 briefly now.

12 THE INTERPRETER: Most certainly, your Honor. The
13 interpreter has a continuous oath with the court with the
14 Southern District.

15 THE COURT: Thank you very much. If it's on file,
16 that's sufficient. Thank you very much.

17 Please proceed, Mr. Kumar.

18 MR. KUMAR: Your Honor, I have the plaintiff's direct
19 testimony.

20 THE COURT: Please hand it forward. Is it marked?

21 MR. KUMAR: Not as an exhibit, your Honor.

22 THE COURT: Please hand it forward.

23 Counsel, we are going to mark this as you have
24 proffered it to Mr. Cajamarca.

25 MR. KUMAR: Yes, your Honor.

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Cajamarca - direct

1 DIRECT EXAMINATION

2 BY MR. KUMAR:

3 Q. Mr. Cajamarca, I am going to show you your declaration in
4 this case.

5 MR. KUMAR: Your Honor, may I approach the witness?

6 THE COURT: Please do.

7 Q. Mr. Cajamarca, can you read the header on top of the piece
8 of paper for me, please.

9 A. This one?

10 Q. Yes.

11 A. Not this one. I can't pronounce it in English.

12 Declaration of Luis Cajamarca.

13 Q. Can you flip to the last page, please. Is that your
14 signature there?

15 A. Yes.

16 Q. Did you come into my office and sign that declaration?

17 A. Yes.

18 Q. And it was read to you in Spanish before you signed it?

19 A. Yes.

20 Q. And that is your true and correct testimony in this action?

21 A. Yes.

22 MR. KUMAR: Plaintiff would like to admit
23 Mr. Cajamarca's declaration in this action as his direct
24 testimony.

25 THE COURT: Thank you very much. I am going to

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Cajamarca - cross

1 propose that we mark Mr. Cajamarca's declaration as Exhibit P7.

2 Mr. Cajamarca, can I ask you one question. Is the
3 testimony contained in that declaration true and correct?

4 THE WITNESS: Yes.

5 THE COURT: Do you offer that as your direct testimony
6 in this matter as if you were testifying live as to all of the
7 matters contained in that declaration?

8 THE WITNESS: Yes.

9 THE COURT: Thank you very much. I'm accepting
10 Plaintiff's Exhibit P7 as Mr. Cajamarca's direct testimony.

11 (Plaintiff's Exhibit P7 received in evidence)

12 THE COURT: Let me turn now to cross-examination,
13 Mr. Strand.

14 MR. STRAND: Thank you, your Honor. I am going to use
15 the name Luis because I can't pronounce the last name. I'm
16 very sorry.

17 CROSS-EXAMINATION

18 BY MR. STRAND:

19 Q. Luis, you said you lived in Queens, correct?

20 A. Yes.

21 Q. Did you live in Queens in 2014 and 2015 when you were
22 working at the restaurant?

23 A. Yes.

24 Q. Woodside or Wood Haven?

25 A. Woodside.

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Cajamarca - cross

1 Q. How did you get to work?

2 A. By train.

3 Q. Which train?

4 A. The 7.

5 THE COURT: Pardon me, counsel. Can I ask a favor.
6 Would you mind please continuing your questioning from this
7 podium next to the witness stand, please.

8 MR. STRAND: Sure.

9 Q. 7 train. Which station did you get on at?

10 A. 46.

11 Q. Where did you get off at?

12 A. Queensborough Plaza and from there I would take the N or
13 the Q.

14 Q. Queensborough Plaza and then N or Q?

15 A. Yes. All the way to 14.

16 Q. You took the N or Q to 14th Street?

17 A. To Union Square.

18 Q. Union Square is on 14th Street. We are good.

19 A. Yes.

20 Q. I got that. You said you were paid part with a check,
21 right?

22 A. Yes.

23 Q. Do you have a bank to deposit that check or did you go to a
24 cashing place?

25 A. I used to cash it.

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Cajamarca - cross

1 Q. You don't have a bank account?

2 A. No. I deposit it at my wife's bank.

3 Q. Your wife does, but you don't.

4 A. No.

5 Q. So you have a wife. You are married?

6 A. I'm not married. We live together.

7 Q. You live together. That's fine. Did she live with you in
8 2014 and 2015?

9 A. In 2014, '15, yes.

10 Q. What's her name, by the way?

11 A. Alicia, Alicia Hernandez.

12 Q. Now, you said you took the 7 train. What time would you
13 leave home to go to work at the restaurant?

14 A. I don't remember exactly, but I would never be late to
15 work.

16 Q. I didn't accuse you of that. I want to clarify this. It's
17 your testimony that you work the same schedule every week. Is
18 that correct?

19 A. Yes.

20 Q. And when we say same schedule, that means the end times
21 were the same?

22 A. Sometimes when there were people there I would stay a bit
23 later, but yes.

24 Q. Later, but sometimes earlier as well, or just later?

25 A. Later.

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Cajamarca - cross

1 Q. You never left earlier, but you would stay later sometimes?

2 A. I never left earlier.

3 Q. Let me just clarify that a little further. Did the
4 restaurant sometimes close earlier, not that you left earlier,
5 like left the job earlier, but did the restaurant sometimes job
6 at maybe like 9 instead of 10?

7 A. No.

8 Q. Now, I want to ask now about an inconsistency in the
9 complaint. I'm not accusing you of making an inconsistent
10 statement.

11 MR. KUMAR: Your Honor, objection. The complaint is
12 not verified in this action. Mr. Cajamarca never swore to its
13 authenticity or the veracity of the allegations.

14 THE COURT: Overruled. You can proceed.

15 Q. Azem Hasangjikaj fired you, correct?

16 A. He called the chef, Segundo, saying Martino should go on
17 vacation, and then Martino told me that there was no business
18 and there was no more.

19 THE COURT: Pardon. Let me just note for the record.
20 Is this Mr. Hasangjikaj who has just joined us?

21 MR. STRAND: Yes, your Honor.

22 THE COURT: I will note that Mr. Hasangjikaj has
23 appeared. Proceed.

24 Q. Mr. Hasangjikaj fired you, correct?

25 A. Yes. He called me. He said no more.

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Cajamarca - cross

1 Q. Did you ever say that Segundo fired you?

2 A. No. He told me, not Segundo.

3 THE INTERPRETER: Interpreter needs clarification.

4 Interpreter correction.

5 A. Segundo told me that Martino said for me to go on vacation,
6 that there was no more work, and then I called him. I called
7 and then he called me saying there was no more work, there was
8 no business.

9 THE COURT: When you say he, are you referring to
10 Mr. Calle or Mr. Hasangjikaj?

11 THE WITNESS: Martino.

12 THE COURT: Thank you.

13 MR. STRAND: Hasangjikaj, it's his middle name.

14 Q. Was there a meal, a community meal of restaurant employees
15 from 4 p.m. to 5 p.m. where the employees could show up early
16 and eat dinner? Did that happen?

17 A. Yes. We would eat together for about 15, 20 minutes, max.

18 Q. You agree there is a meal. You just say it was shorter.

19 A. Yes.

20 Q. It wasn't 60 minutes long.

21 A. No.

22 Q. And it started at 4?

23 A. The meal?

24 Q. Yeah.

25 A. I don't remember exactly.

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Cajamarca - cross

1 MR. STRAND: I have no more questions.

2 THE COURT: Thank you. Mr. Kumar, any redirect?

3 MR. KUMAR: No redirect, your Honor.

4 THE COURT: Thank you very much.

5 Thank you, Mr. Cajamarca. You can step down.

6 (Witness excused)

7 THE COURT: Mr. Kumar, do you have any additional
8 witnesses or testimony that you would like to present to the
9 Court in this matter?

10 MR. KUMAR: No, your Honor.

11 THE COURT: Counsel, I understand that the parties
12 have stipulated to the admission of all of the plaintiff's
13 exhibits as identified in the joint pretrial order that I
14 ordered last week. Is that correct?

15 MR. KUMAR: Yes, your Honor.

16 THE COURT: Is that correct, Mr. Strand?

17 MR. STRAND: Yes, your Honor.

18 THE COURT: Mr. Kumar.

19 MR. KUMAR: Plaintiff rests, your Honor.

20 THE COURT: Thank you very much.

21 Mr. Strand.

22 MR. STRAND: Your Honor, may I have a very brief
23 recess to discuss some of the direct testimony by affidavit
24 procedures with my client.

25 THE COURT: Yes, you may. We will take a seven-minute

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Hasangjikaj - direct

1 recess. Let's plan to resume at exactly 9:50. Thank you very
2 much.

3 (Recess).

4 THE COURT: Mr. Strand, please call your first
5 witness.

6 MR. STRAND: Absolutely. Defense calls Azem Martino
7 Hasangjikaj.

8 THE COURT: Mr. Hasangjikaj, please come forward.

9 AZEM HASANGJIKAJ,

10 a defendant, called as a witness on his own behalf,
11 having been duly sworn, testified as follows:

12 THE COURT: Please proceed.

13 MR. STRAND: Your Honor, I am going to submit the
14 direct testimony affidavit, but I realize there is a typo in my
15 paragraph 9. May I ask him a question to correct the typo?

16 THE COURT: Please do that as part of the questioning
17 that you are about to do in order to authenticate the document.

18 MR. STRAND: Sure. Let the record reflect that I'm
19 showing the witness the direct testimony affidavit of Azem
20 Hasangjikaj.

21 DIRECT EXAMINATION

22 BY MR. STRAND:

23 Q. Sir, do you recognize this?

24 A. I'm sorry.

25 Q. Do you recognize that document?

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Hasangjikaj - direct

1 A. Yes, I do.

2 Q. Where do you recognize it from?

3 A. From the last testimony.

4 Q. From when I met with you and notarized?

5 A. Yes. That's correct.

6 Q. Let me just ask, because there is a typo in paragraph 9.

7 It says shift when it should say lunch shift. Can you describe
8 for the Court what were the plaintiff's shift hours? For
9 lunch, what were his work hours, and for dinner?

10 A. If someone worked for lunch, he would have worked from 12
11 to 3, approximately. And then, you know, that break. There is
12 nothing between 3 and 5. They can go back at 4:00 and have a
13 lunch and that's their break time. 5:00 they would start to
14 work. And the guy who worked through lunch, his shift will end
15 10 to make sure that they don't exceed it. Make sure that is
16 their shift. A lot of times I let them go early because there
17 is no business, but what it means.

18 Q. I just want to clarify because it said he when he worked a
19 shift and it was supposed to say when he worked a lunch shift.
20 I just needed to fix that.

21 Does this affidavit constitute your direct testimony
22 in this case?

23 A. Repeat one more time. Sorry.

24 Q. Does this document constitute your testimony in this case?

25 A. Yes, it does.

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Hasangjikaj - direct

1 MR. STRAND: Thank you.

2 THE COURT: Thank you. Let me ask you two brief
3 questions, if I can, Mr. Hasangjikaj. First, can you please
4 look at the last page of the document that you're looking at
5 right now. Please look at the last page of the document that
6 you are looking at. Is that your signature on the last page?

7 THE WITNESS: Yes.

8 THE COURT: Is all of the information contained in
9 that document true and correct?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: You understand that you are testifying
12 under oath here today in this proceeding. Do you affirm that
13 the information contained in that affidavit constitutes your
14 testimony in court here today as if it were delivered live
15 before me?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: Thank you very much. I am going to
18 propose to mark Mr. Hasangjikaj's affidavit as Defendant's
19 Exhibit 2, and I will accept it as Mr. Hasangjikaj's direct
20 testimony. I understand that the testimony is intended to be
21 modified such that paragraph 9 would read in the second line,
22 workday lunch shift rather than simply workday shift. Thank
23 you very much.

24 (Defendant's Exhibit 2 received in evidence)

25 THE COURT: Mr. Kumar, please proceed.

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Hasangjikaj - direct

1 MR. KUMAR: Your Honor, during the pretrial conference
2 the defense counsel was going to extend his direct so your
3 Honor could get a foundation for Defendant's Exhibit A.

4 THE COURT: Thank you, Mr. Kumar, for reminding me of
5 that. I appreciate that.

6 Mr. Strand, would you please come forward.

7 MR. STRAND: Yeah, sure. I forgot, too. Thank you,
8 your Honor.

9 Let the record reflect I'm showing the witness the
10 first page of the defense first exhibit, or Exhibit A, however
11 we marked it.

12 Q. Do you recognize this document?

13 A. Yes.

14 Q. Where do you recognize it from?

15 A. Really, the guy who works for me, he marks the shifts as
16 they scheduled them to work.

17 MR. STRAND: Let the record reflect I'm now turning to
18 the second page, employee detail for Yerina Restaurant Corp.

19 Q. Do you recognize this?

20 A. Yes.

21 Q. Where do you recognize it from?

22 A. From my records.

23 MR. STRAND: Your Honor, I'd like to offer in evidence
24 Defense Exhibit 1 the payroll records of the restaurant.

25 THE COURT: Thank you. I understand that there is a

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Hasangjikaj - direct

1 stipulation to this. Mr. Kumar.

2 MR. KUMAR: Pardon me, your Honor. I didn't hear you.

3 THE COURT: There is a stipulation as to this. Is
4 that correct, Mr. Kumar?

5 MR. KUMAR: There is, your Honor.

6 THE COURT: Thank you. It's accepted into evidence.

7 (Defendant's Exhibit 1 received in evidence)

8 THE COURT: You can step down, Mr. Strand, unless you
9 have additional questions.

10 Mr. Hasangjikaj, the first page that was just pointed
11 to by Mr. Strand has dates under weekly kitchen. Can you tell
12 me what year these records refer to?

13 THE WITNESS: I believe 2014, I think.

14 THE COURT: Do you know that to be true?

15 THE WITNESS: I am not sure.

16 THE COURT: And the remainder of Exhibit A contains a
17 number of records which are described as employee details for
18 Yerina Restaurant Corp. Can you tell me what the system is
19 that's used to produce these records?

20 THE WITNESS: Make sure we mark people as we schedule
21 them to work and mostly we work dinner. And we mark them as
22 they come. Like if they show up at 12:00, we put them lunch
23 shift and then they have a break. Then they work until 9:00.
24 Depends on business. Mostly no more than 10. And they go
25 home.

G6RMCAJ2

Hasangjikaj - direct

1 THE COURT: How are these records produced? What is
2 the system that is used for that purpose?

3 THE WITNESS: I am not sure I understand.

4 THE COURT: Sir, I'm pointing you to a set of
5 documents that have been identified to me as your payroll
6 records. I'm asking you what the system is, the computerized
7 system that is used to produce these records.

8 THE WITNESS: We actually manually did it until now.
9 We have PI system. We have a computer system.

10 THE COURT: Thank you. Someone manually inputs the
11 number of hours into this report, is that correct?

12 THE WITNESS: Yes, your Honor.

13 THE COURT: Thank you.

14 Please proceed, Mr. Kumar.

15 (Continued on next page)
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G6RACAJ3ps

Hasangjikaaj - cross

1 MR. KUMAR: Thank you, your Honor.

2 THE COURT: You can proceed.

3 MR. KUMAR: Thank you, your Honor.

4 CROSS EXAMINATION

5 BY MR. KUMAR:

6 Q. Sir, you are the owner of Yerina Restaurant Corp.?

7 A. Yes.

8 Q. Yerina Restaurant Corp. owns a restaurant called Arte
9 Restaurant?

10 A. Yes, I am.

11 Q. Arte is located in Manhattan?

12 A. Yes, it is.

13 Q. Arte Restaurant is an Italian restaurant?

14 A. Yes.

15 Q. You've owned Arte Restaurant for over 20 years?

16 A. Yes.

17 Q. Closer to 30 years, correct?

18 A. No, 23 years.

19 Q. OK, 23 years. And for the past three years, you've hired
20 all of the employees that have worked at Arte Restaurant?

21 A. Most likely, yes.

22 Q. Sir, did you hire Mr. Segundo Calle to work for you?

23 A. Did I hire?

24 Q. Mr. Segundo Calle to work for you.

25 A. Yes, I did.

G6RACAJ3ps

Hasangjikaj - cross

1 Q. Mr. Calle is the head cook at Arte Restaurant, correct?

2 A. Yes.

3 Q. Does Mr. Calle still work for you?

4 A. Yes.

5 Q. Mr. Calle lives in Queens, correct?

6 A. Yes.

7 Q. Do you know if Mr. Calle is ill today?

8 Is he ill today?

9 MR. STRAND: I'm going to object to that on relevance
10 grounds.

11 THE COURT: Overruled.

12 A. I don't know. I have no idea whether he is ill today. I,
13 I woke up at 6 o'clock in the morning, so I don't know if he's
14 ill. He's not going to be here until 4 o'clock.

15 Q. OK. That's a fair answer.

16 Mr. Calle has worked for you for over ten years?

17 A. Yes. 20 years.

18 Q. Mr. Calle is still your employee, correct?

19 A. Yes.

20 Q. As head cook, he's in charge of the kitchen; is that
21 correct?

22 A. Could you repeat that again?

23 Q. As head cook, Mr. Calle is in charge of the kitchen?

24 A. Yes, he is.

25 Q. You pay Mr. Calle on a salary basis?

G6RACAJ3ps

Hasangjikaaj - cross

1 A. Yes.

2 Q. You pay him on a salary basis because, in part because he's
3 an independent contractor?

4 A. Yes.

5 Q. Because you pay Mr. Calle -- my apologies.

6 Because Mr. Calle is paid on a salary basis, he's
7 given a little more freedom as to when he is allowed to come in
8 and when he's allowed to leave; is that correct?

9 A. He comes when he wants to come. You know, he really
10 doesn't have a schedule to come, but he -- yeah, he comes --
11 he's in charge.

12 Q. So that's a yes.

13 A. Yes.

14 Q. If you would ask Mr. Calle to come in and testify today, he
15 would have come in to testify; is that correct?

16 A. He would come, where?

17 Q. To testify here today, if you had asked?

18 A. Well, he, he didn't really. I didn't ask, but he would
19 probably.

20 Q. And in court today?

21 A. I did not ask him, but if I did, I'm sure he would have
22 come, I believe.

23 Q. You manage the day-to-day operations of Arte Restaurant; is
24 that correct?

25 A. Yes.

G6RACAJ3ps

Hasangjikaaj - cross

1 Q. You work every day?

2 A. Yes.

3 Q. Seven days a week.

4 A. Seven days.

5 Q. And you start your day at 4 p.m.

6 A. Yes.

7 Q. Arte Restaurant opens before 4 p.m.; is that correct?

8 A. Yes. Open at noon. Opens five days at noon.

9 Q. And you let someone else open the restaurant for you,
10 because you don't get there until 4; is that correct?

11 A. My daughter opens.

12 Q. I'm sorry. Can you say that again?

13 A. My daughter operates through the lunch hours.

14 Q. And then someone else also has keys to open the restaurant;
15 is that correct?

16 A. Well, she has the keys.

17 Q. What about Mr. Vilson Brulha, B-r-u-l-h-a, does he have
18 keys to open the restaurant?

19 A. Vilson has the keys, but, you know, he comes later because,
20 you know, she opens the restaurant. He doesn't have to come
21 early.

22 Q. Can you spell your daughter's name, please.

23 A. Villoca, V-i-l-l-o-c-a.

24 Q. And as you said before, your daughter runs things while
25 you're not there. She runs the lunch shift.

G6RACAJ3ps

Hasangjikaj - cross

1 A. Yes, she does.

2 Q. And she keeps an eye on things because you're not there; is
3 that correct?

4 A. She is -- I'm sorry, because, you know, my ears are -- I'm
5 not hearing very well, so sometime I'm asking you to repeat.

6 Q. If you need me to repeat any question, just ask and I'll do
7 it. OK?

8 A. This last question.

9 Q. She keeps an eye on things for you, because she runs the
10 lunch shift; is that correct?

11 A. Yeah. She's there.

12 Q. And she keeps track of when employees come in and when they
13 leave. Is that correct?

14 A. Yes.

15 Q. And your daughter, Villocia, she currently lives with you;
16 is that correct?

17 A. She lives with me.

18 Q. If you asked her to come in to testify today, would she
19 have come in?

20 A. She might. She have to.

21 Q. If you had asked her.

22 A. Yes, I'm sure she would.

23 Q. Mr. Brulha is the head waiter at Arte Restaurant; is that
24 correct?

25 A. Yes.

G6RACAJ3ps

Hasangjikaaj - cross

1 Q. He has worked for you for over ten years?

2 A. Yes.

3 Q. He comes in during the lunch shift as well?

4 A. Yes, he does.

5 Q. And part of his duties is to train the wait staff; is that
6 correct?

7 A. Mostly, yes.

8 Q. And he also has to make the schedule for the kitchen staff.

9 A. Yes, he does.

10 Q. Since he's there earlier than you, he also helps keep track
11 of when employees come in for lunch shift; is that correct?

12 A. Yes.

13 Q. Mr. Brulha still works for you?

14 A. Yes, he does.

15 Q. Do you know what county he lives in?

16 A. Well, now I believe he lives in Manhattan. He used to live
17 in Westchester. Connecticut.

18 Q. And if you had asked Mr. Brulha to come in and testify, he
19 would have, correct?

20 A. He would, yes.

21 Q. The plaintiff in this action, he was employed as a pasta
22 man; is that correct?

23 A. Repeat that again?

24 Q. Mr. Cajamarca, Luis, he was employed as a pasta man, right?

25 A. As a cook.

G6RACAJ3ps

Hasangjikaaj - cross

1 Q. A cook or pasta man?

2 A. Cook.

3 Q. OK.

4 A. How you define, you mind if I say? Those guys are not
5 lawyers; they're cooks, they cook, in general cook, can make
6 pasta, can make veal, can make salad. It's a cook. That's
7 what we consider him, as a cook. His title is pasta man.

8 Q. Because of his duty -- because he's a cook or pasta man,
9 his general duties include making pasta, and he also helps cook
10 meats and makes salads; is that correct?

11 A. It's correct, but most of the time I have a salad man, you
12 know, so everybody has his own, you know, space there.

13 Q. And Mr. Cajamarca's salary was \$700 per week net; is that
14 correct?

15 A. Yes.

16 Q. And he was paid \$700 every week.

17 A. Yes.

18 Q. You consider him an independent contractor; is that
19 correct?

20 A. Yes. That's what deal was when he came. He didn't want to
21 work by --

22 Q. Yes or no, sir. You think of him as an independent
23 contractor, correct?

24 A. Independent, yes.

25 Q. So you didn't keep track of his actual time in; is that

G6RACAJ3ps

Hasangjikaaj - cross

1 correct?

2 A. Yes.

3 Q. And you didn't keep track of when he left; is that correct?

4 A. I kept track, even though he was not employed, because he
5 has his time in, he left whether he wanted or not, so he was
6 not someone who stay longer.

7 Q. Did you keep a written record of when Mr. Cajamarca left
8 work?

9 A. When he left, he, I always knew his hours there.

10 Q. Sir, did you keep a written record of when Mr. Cajamarca
11 left work?

12 A. Sir, he had a schedule --

13 Q. Yes or no, sir?

14 A. I have to sense this, it's not -- he has a schedule, so it
15 would say from 5 to 10, and, you know, he left at 9:30. So we
16 didn't really, you know, take anything off from him, just let
17 him, you know, go. That's what I said.

18 MR. KUMAR: Your Honor, move to strike the response of
19 the witness.

20 THE COURT: Thank you. Denied. You can ask a
21 question.

22 Q. Sir --

23 A. This --

24 Q. You have a written record of when he left?

25 A. No.

G6RACAJ3ps

Hasangjikaj - cross

1 Q. Thank you. Was there any fluctuation from week to week
2 concerning Mr. Cajamarca's pay?

3 A. No.

4 Q. You state in your direct testimony that work schedules for
5 employees are done by meal shift, lunch and dinner. Is that
6 correct?

7 A. Yes.

8 Q. Was this true for Mr. Cajamarca as well?

9 A. The schedule, yes.

10 Q. And if an employee worked a lunch, he always worked a
11 denar; is that correct?

12 A. Not all of them. They have like one day, two -- one day,
13 two days, depends. Not, you know, not steady, not every, every
14 day.

15 Q. So if he worked a lunch, he could have just worked lunch;
16 is that your testimony?

17 A. When he worked the lunch, he worked 12 to 3, and then he
18 had a break. Well, went, went to sleep downstairs, and then he
19 came back 5 o'clock. Once he came to eat, and then he went
20 back and relax until 5 o'clock. At 5 o'clock, the dinner
21 starts, at our restaurant normally, whether they start or not,
22 but 5 o'clock, some people start coming, and then they are, you
23 know, they come back to work.

24 Q. Let's answer the question that was asked. If Mr. Cajamarca
25 worked a lunch, could he go home just -- and work just lunch

G6RACAJ3ps

Hasangjikaaj - cross

1 that day, or did he have to come back and work dinner?

2 A. He would have to work dinner. He would have to come back
3 for dinner.

4 Q. According to your testimony, Mr. Cajamarca worked only one
5 lunch and five dinners; is that correct?

6 A. Mostly, yes.

7 Q. That means he only worked five days a week?

8 A. Sometimes yes. Six shifts, sometimes -- we mark the shifts
9 there, sometimes yes. Six shifts, sometimes five shifts,
10 depends. Depends on business.

11 Q. Sir, I'd like to turn you to Defendant's Exhibit A. Do you
12 still have it with you? Sir, that's Defendant Exhibit 2. I
13 believe you're looking at your direct testimony. Is that
14 correct?

15 A. Exhibit A.

16 Q. Right.

17 A. Yes.

18 MR. KUMAR: Your Honor, may I approach the witness?

19 THE COURT: Please do.

20 Q. Here, this is Defendant's A.

21 Sir, can you turn to the first page of Defendant's
22 Exhibit A, the page that has four grids on it. Are you looking
23 at it?

24 A. Yes, sir.

25 Q. The page after the one that you're looking at, it has a

G6RACAJ3ps

Hasangjikaaj - cross

1 weekly schedule with four grids. Is that correct?

2 A. Yes.

3 Q. The top of each grid says "weekly kitchen"?

4 A. Yes.

5 Q. There are names on the left-hand column?

6 A. Yes.

7 Q. Is Mr. Cajamarca's name listed anywhere on that document?

8 A. It's not, if it not -- was in the past. This was current,
9 you know, it was this year, this, you know. He was -- they
10 were all, but he's not here because this is long, long gone,
11 it's over a year.

12 Q. I'm sorry, sir. Do you know what year the --

13 A. He is not --

14 Q. -- that sheet comes from?

15 A. 2016.

16 Q. OK. So the first page of Exhibit A, where it says "weekly
17 kitchen," is from this year, 2016; is that correct?

18 A. Yes.

19 Q. Now, next to each employee's name, there is either a check
20 or an X. Is that correct?

21 A. Yes.

22 Q. Anywhere on the sheet, does it show the precise time any of
23 these employees arrived to work?

24 A. If they didn't arrived, mostly we will mark them off.

25 Q. Does it have a time on that sheet?

G6RACAJ3ps

Hasangjikaaj - cross

1 A. Say again?

2 Q. Is there a time on that sheet, sir?

3 A. It's an X when it doesn't show up.

4 Q. So there's no time.

5 A. No.

6 Q. Anywhere on this sheet, does it show the precise time any
7 of these employees left work?

8 A. In what sense you mean "left work"?

9 Q. Does it have a time that shows when -- that corresponds to
10 when any employee left work?

11 A. They have a schedule. That's their time. They know what
12 time to work, what time they work, you know.

13 Q. Is there a time on that sheet that shows when an employee
14 left work?

15 A. There is not, but it's known in the restaurant, 12 to 3, 5
16 to 10.

17 Q. Right. So you said that the shifts are split into lunch
18 and dinner. Is that correct?

19 A. Some shifts, when they worked lunch and dinner, they go
20 early. So the shifts are 12 to 3 and 5 to 10.

21 Q. OK. Anywhere on that sheet, does it say lunch shift,
22 dinner shift, or anything like that?

23 A. (Pause) Doesn't say here. I don't see -- it doesn't say
24 here. It doesn't specify here, but, you know, there's another
25 sheet they have, they have, you know, lunch and dinner when,

G6RACAJ3ps

Hasangjikaj - cross

1 you know, it's a different shift.

2 Q. So using this sheet and this sheet alone, can you tell me
3 when an employee worked a lunch shift, when an employee worked
4 a dinner shift, or when an employee worked a lunch and a dinner
5 shift?

6 A. Just have three guys working for lunch, you know, and
7 different schedule, you know, like they worked two days and
8 they have a schedule there, which is written out of places two,
9 and the schedule is like, for example, Luis works today and he
10 knows, you know, not work or there will be a schedule here if
11 he worked today and he has to work tomorrow again. So he has
12 one day. And then he -- or he has only dinners to work. So
13 they all have a schedule like that, because we don't have a
14 lunch business. Mostly we go for friend or something but not,
15 you know, much lunch business.

16 Q. Sir, using that sheet and that sheet alone, can you tell me
17 whether an employee worked a lunch shift?

18 A. Those are just, it just --

19 Q. Using that sheet alone, can you tell whether an employee
20 worked a lunch shift?

21 A. I -- if can tell you -- no, you know, I know when they
22 worked. I can tell on the sheet, in the sheet, where they
23 worked.

24 Q. Using just that record, can you tell me whether an employee
25 worked a dinner shift?

G6RACAJ3ps

Hasangjikaj - cross

1 A. No. No, because it's just a schedule of the days.

2 Q. And in your direct testimony, you said that this is not how
3 the employee time records are usually kept, correct?

4 A. No -- yes, I did. Say no.

5 Q. Was that the same for 2013 through 2015?

6 A. I, I don't think so, but I don't have it on me, I don't
7 have, so...

8 Q. You said in your direct testimony that the records that you
9 usually kept have exact numbers on them. Is that correct?

10 A. Yeah. It's got lunch and dinner, so who worked lunch, who
11 worked dinner, so everything specifies where, you know, just to
12 let them know who is on schedule to work for next day. That's
13 all.

14 Q. Now, by "exact numbers," do you mean the schedule of when
15 they're supposed to come in, or do you mean the exact time they
16 came in?

17 A. We know exact time, so if they come straight at 12 o'clock
18 and they start from 5 another shift.

19 Q. OK. The records that are kept now, are they a schedule, or
20 if an employee came in at 12:02, is that marked down?

21 A. They are all told and they are all -- have agreement with
22 me when they come that they -- their schedule, they ask for it,
23 you know, they ask for their time, like Mr. Cajamarca, well, he
24 asked for his, what hours he's going to work, and he asked for
25 his pay. He didn't want to work by hours, he said I want to

G6RACAJ3ps

Hasangjikaaj - cross

1 get paid flat, I want to take \$700, half and half. So \$700
2 after the taxes he got paid, Mr. Cajamarca.

3 Waste of my time because it's a whole, you know,
4 restaurant industry know that Mr. Cajamarca, he sues every
5 restaurant. And I'm about, you know, losing the business, you
6 know, losing the business, that I don't have enough business
7 and Mr. Cajamarca comes and puts me in the court for -- he
8 getting his full pay and his arrogance towards the workers and
9 me and everybody that he refused to work. That's what I want
10 to say.

11 I'm really, you know, tell you -- you ask me how many
12 times and I don't change, you know. I can look at it a million
13 times and I will say the same. Because it's a restaurant.
14 It's not a, you know, law firm. It's -- they know exactly.
15 And they have -- they know more rights than I do. And they ask
16 for every single thing, and they get more than they ask. He
17 specifically came to me and said, I do not want to work by
18 hours, I want to make \$700 after taxes, flat. Whether he works
19 odd hours or he doesn't work, he goes home at 9 o'clock, 8
20 o'clock, whole summer at 8 o'clock. Why doesn't he pay me back
21 for this.

22 MR. KUMAR: Move to strike, your Honor.

23 THE COURT: Denied.

24 Q. Sir, is it fair to state that the top sheet where it says
25 "weekly, weekly kitchen," isn't an accurate representation of

G6RACAJ3ps

Hasangjikaj - cross

1 how you currently keep your records?

2 A. This is only for Vilson to know who's coming that day, but
3 they all have, you know, they all have a different agreement
4 with the chefs where they work, they all know they have in the
5 kitchen, place there, for example, Segundo works lunch today
6 and then he goes, you know, break, and he comes back at 5
7 o'clock. All of them have a break. They don't, you know, they
8 have moderate. They have from 5 to -- you know, 3 to 5, mostly
9 3 to 5, you know, so they, sometimes they say 4 to 5 or 3 to 5,
10 there's nobody there.

11 And it specifies there, it's a lunch shift, dinner
12 shift. Yeah. Lunch shift is only two and a half, three hours,
13 and then dinner shift starts 5 to 10.

14 Q. So you keep your records differently than what's -- the
15 first --

16 A. Yes. This was just -- this was the schedule just for him
17 to know who is -- who works there, you know.

18 Q. OK. Can you turn to the next page, please, sir Defendant's
19 Exhibit A.

20 A. Yes. What do you mean?

21 Q. Just turn to the next page. This document begins "payroll
22 records for Arte restaurant for the years 2014 and 2015." Is
23 that correct?

24 A. Yes.

25 Q. On the top right-hand corner of that page, you should see a

G6RACAJ3ps

Hasangjikaaj - cross

1 sticker this says "Plaintiff's Exhibit" and the number 2
2 handwritten.

3 A. Yes.

4 Q. Are you on that page?

5 A. Yes.

6 Q. On the top page, there are written headers. Is that
7 correct?

8 A. Yes.

9 Q. "Date, STA, regular hours, or REG HRS gross," etc.?

10 A. Yes.

11 Q. Toward the bottom of the page, is there a line that says
12 "Cajamarca, Luis R."?

13 A. Yes.

14 Q. Underneath that it says "QTR 1"? Is that correct?

15 A. I don't see that, no.

16 MR. KUMAR: Your Honor, may I just --

17 THE COURT: Please do.

18 A. I have it.

19 Q. You do? OK. And under "QTR 1" there are some weekly
20 dates. Is that correct?

21 A. Yes.

22 Q. Next to each of the weekly dates it says the number 40. Is
23 that correct?

24 A. Yes.

25 Q. That number corresponds to the column "REG HRS"; is that

G6RACAJ3ps

Hasangjikaj - cross

1 correct?

2 A. Yes.

3 Q. The number 40 is just a placeholder, right?

4 A. Yes. Correct. Because of -- I can explain that, how,
5 because he -- he actually had the -- he had the schedule that
6 makes those hours approximately. He scheduled himself in that,
7 as far as, you know, independent contractor. He asked for the
8 time and the time that he's going to work and that's it. He,
9 you know, he is -- why they wrote this is, is a record of his
10 hours. This is maximum hours. Never reach that, but we paid
11 him because this was the agreement. We needed him to pay him
12 \$700.

13 Q. And that's 40 regular hours, though.

14 A. Yes, 40 regular hours for him.

15 Q. Let me finish the question, sir.

16 That was just used to simplify the payroll process,
17 right?

18 A. Yes.

19 Q. All right. So the number 40, that's not the number of
20 hours that he worked. Whether it's above or below I'm not
21 asking. Did he work 40 hours each and every week?

22 A. He never exceeded, never exceeded.

23 Q. Did he work exactly 40?

24 A. Most likely not. It could be, but that's what we have.

25 (Pause)

G6RACAJ3ps

Hasangjikaj - cross

1 A. He never exceeded the 40 hours, but we did pay him because
2 of the agreement of -- between me and him, you know. It was
3 agreement that he gets a salary and he gets \$700, which is,
4 which is, I believe, it's legal, normal things. He wants to
5 get, you know, \$700 clean after taxes, and therefore he got the
6 money. I paid him on based on our agreement.

7 Q. So just so I have it clear, that 40 hours is just a
8 placeholder, correct?

9 MR. STRAND: Objection, asked and answered.

10 THE COURT: You can answer the question.

11 A. In his case, 40 hours doesn't even have to be reason
12 because, I mean, his hours, because he was independent
13 contractor. He did not work by hour. He refused to work by
14 hours. He wanted to get paid. If he got by us, he would not
15 reach the amount of money that he got. So this is, he said,
16 I'm a cook and I want to get paid this much. Therefore I paid
17 him based to he -- his demand, to make him happy. Never
18 complained before that. Never said that except when he was
19 fired.

20 Q. Now, next to where it says "40 hours," close by, do you see
21 the header that says "gross," g-r-o-s-s?

22 A. It's next to the 40 hours?

23 Q. On the top of the page, there should be a column. Close by
24 it says "gross."

25 A. Yes.

G6RACAJ3ps

Hasangjikaj - cross

1 Q. OK. "Gross" means gross wages, correct?

2 A. Yes.

3 Q. Now go back down to Luis Cajamarca.

4 A. Yes.

5 Q. For the week ending May 8, it says Mr. Cajamarca was paid
6 \$450. Correct?

7 A. Correct.

8 Q. Did Mr. Cajamarca gross \$450 that week?

9 A. Well, he -- probably. He probably didn't work all the
10 days. He probably worked last days. He didn't -- he didn't
11 work -- he didn't work six days, five days. He didn't work
12 four days. He probably worked three days. If he was paid like
13 that, isn't based to this, you know, amount of work, days he
14 worked.

15 Q. Let's go down to May 15. He should have worked his full
16 shift by then. It's the next week. Is that correct?

17 A. I don't have an answer for that. I really doesn't know.
18 It's long past, and it will not be paid last if he worked full
19 days. That's my answer.

20 Q. At any point did Mr. Cajamarca only gross \$450 a week?

21 A. No.

22 Q. He always got paid, he always netted \$700?

23 A. There is a difference paid. Remember, he got 1099 and this
24 one, so I'm sure the difference was paid in the, you know,
25 1099.

G6RACAJ3ps

Hasangjikaaj - cross

1 Q. So using just those records, can you tell me how much
2 Mr. Cajamarca got paid in 2014? No extraneous information,
3 just those records.

4 A. He got paid \$700.

5 Q. Does it say \$700 on those records, or more?

6 A. We have the record. We gave you the record between, you
7 know, the 1099 and the check that he got.

8 Q. Yes or no, sir, using just those records, can you tell me
9 how much Mr. Cajamarca got paid?

10 A. What he has here, he has another check -- he has a -- we
11 provided you and my attorney, we provided with information how
12 he was paid.

13 Q. Using just those records, can you tell me how much
14 Mr. Cajamarca got paid, not anything else, just what's in your
15 hand?

16 A. I know, but what you trying to do, you trying to frame me
17 on the question here. I am telling you that you have a full
18 record. The reason from you, that you said that he was paid
19 \$700. And last he worked last days, he was paid last. So it
20 doesn't matter -- let's say he was paid 450. That means the
21 time that he worked. He was paid based on the days that he
22 worked.

23 Q. Can you tell me using those records whether or not he was
24 paid 450 more or less?

25 A. I see here 450.

G6RACAJ3ps

Hasangjikaj - cross

1 Q. But he was paid more.

2 A. He would take more.

3 Q. He would take more or he was paid more?

4 A. I'm not sure here, because I can't answer something that I
5 don't have on the records. I don't remember. I have to go
6 back and check on this because I don't remember what he was
7 paid that week. You're asking me two years later, and I
8 don't -- I don't really know. I don't want to just make, make
9 up a story and say I paid him this much or that much. I don't
10 know. But based on the evidence, whatever it says there, and
11 it's paid and based to the time that he worked, meaning the
12 days he worked, and he will come and tell me, he will come and
13 tell me. He comes and tell me, I worked this much. If he
14 worked five days, he would not walk home without getting paid.
15 Normal.

16 Q. You pay taxes on the check amount that you gave
17 Mr. Cajamarca; is that correct?

18 A. Yes.

19 Q. Are you responsible for paying the payroll taxes for Arte
20 Restaurant?

21 A. No. It's Maria. Maria Dinu.

22 Q. And Maria Dinu is your bookkeeper?

23 A. Yes.

24 Q. Do you know if the payroll taxes were paid on the cash
25 amounts paid to Mr. Cajamarca?

G6RACAJ3ps

Hasangjikaj - cross

1 MR. STRAND: Objection. What's the relevance of that
2 question?

3 THE COURT: Overruled.

4 Q. Does the --

5 THE COURT: Overruled. You can answer that question.

6 A. I can then answer because I know they were paid, yes.

7 Q. So you paid payroll taxes on --

8 A. Yes. We sent to him and we sent to the government.

9 Q. Sir, can you look at the affidavit that constitutes your
10 direct testimony. Paragraph 3, the first sentence is, "The
11 restaurant is open from 12 p.m. to 10 p.m. Monday through
12 Thursday, from 12 p.m. to 11 p.m. on Friday, from 5 p.m. to 11
13 p.m. on Saturday, and from 5 p.m. to 10 p.m. on Sunday." Did I
14 read that correctly?

15 A. Yes.

16 Q. Is that paragraph correct?

17 A. Yes.

18 Q. Were those the hours for Arte Restaurant in 2014?

19 A. Yes.

20 Q. Were those the hours for Arte Restaurant in 2015?

21 A. Yes.

22 Q. Have you ever told anyone that Arte Restaurant was open
23 later than what you put in your direct testimony?

24 A. No.

25 Q. Had you ever advertised that Arte Restaurant is open later

G6RACAJ3ps

Hasangjikaaj - cross

1 than what's in your direct testimony?

2 A. Not that I know, no, definitely.

3 Q. And in the last three years, that has been the schedule for
4 the restaurant.

5 A. Yes.

6 Q. In the last three years, you haven't advertised that Arte
7 Restaurant is opened past those hours.

8 A. In last 15 years I haven't advertised.

9 Q. Not in the newspaper?

10 A. No.

11 Q. Not on the radio?

12 A. No.

13 Q. Not on Facebook?

14 A. I don't have Facebook. I don't know, you know, what people
15 do on Facebook, but not me. I did not advertise that, no.

16 Q. Do you know if Arte Restaurant advertises on Facebook?

17 A. I don't go on Facebook that much. I'm an old-fashioned guy
18 as far as these things. I don't go, to be honest with you, I
19 don't go on Facebook. I don't know what they do with Facebook.
20 I mean, I'm there 23 years. I believe I do right things. I
21 have relation with the guests that, they come in the
22 restaurant. And I, I don't advertise -- don't advertise -- I
23 don't put on Facebook. What the kids do on Facebook, I mean,
24 they can say that they work 24 hours. I don't know.

25 Q. What about Yelp? Have you ever heard of the website Yelp?

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Hasangjikaj - cross

1 Do you advertise on Yelp?

2 A. Not me.

3 Q. Is there any document that might change your testimony
4 about whether or not Arte Restaurant advertises on Yelp or
5 Facebook?

6 A. I mean, there is people out there are that are their
7 followers and they can write whatever they want and they can
8 put the stuff. But in my, you know, in my schedule, that's
9 what the hours are and that's what the time is, and, you know,
10 it doesn't mean we stay until then if there's no business. But
11 those are the hours that we, you know, prepare to, you know, be
12 open.

13 Q. If I showed you the Arte Restaurant Facebook page, do you
14 think you would recognize it?

15 A. Would I recognize?

16 Q. The Arte Restaurant Facebook page?

17 A. I don't even know if it has one, to be honest with you.

18 Q. What about the Arte Restaurant Yelp page? If I showed it
19 to you, do you think you would recognize it?

20 A. Maybe the workers do. I don't know. I'm sure I would
21 recognize, but I, I don't have to see it, because this is
22 definite and this is proof, Arte Restaurant has been open those
23 hours that I'm saying and no longer hours.

24 MR. KUMAR: Your Honor, may I approach the witness?

25 THE COURT: Please do.

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Hasangjikaaj - cross

1 MR. KUMAR: Let the record reflect I'm handing --

2 THE COURT: Show it to Mr. Strand. Also provide a
3 copy to the Court if you have one.

4 MR. KUMAR: Yes, your Honor.

5 MR. STRAND: I object to the use of all these
6 documents, as they were not included in the joint pretrial
7 order.

8 THE COURT: Thank you. Overruled. There is no
9 question pending. Proceed.

10 Q. I'm showing you two documents, handing them to you.

11 THE COURT: Are those marked for identification
12 purposes, counsel?

13 MR. KUMAR: Yes, your Honor.

14 THE COURT: Thank you. Sir, I understand, Mr. Kumar,
15 that you have shown the witness that are marked as Plaintiff's
16 Exhibits P8 and P9 for identification purposes. Is that
17 correct?

18 MR. KUMAR: That is, your Honor.

19 THE COURT: Thank you.

20 THE WITNESS: I can answer for this.

21 MR. STRAND: Which one are you marking as P8, your
22 Honor?

23 THE WITNESS: Just look at it closer.

24 MR. KUMAR: P8 is Facebook. P9 is Yelp.

25 THE WITNESS: Your Honor, may I answer to this?

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Hasangjikaj - cross

1 THE COURT: There's no question pending.

2 MR. KUMAR: There's no question.

3 Q. Sir, I'm handing you, I handed you what has been marked as
4 Plaintiff's P8 and Plaintiff's P9. P8 --

5 A. This is aside from what you shown me from Internet. Go
6 ahead.

7 Q. Sir, on the bottom of P8, this document here --

8 A. The first page?

9 Q. Yes, sir. Does it say "Arte Restaurant" in the top
10 left-hand corner?

11 A. Yes.

12 Q. And on the bottom, is there a web address that starts with
13 www.Facebook.com?

14 A. Yeah, I see that.

15 This makes no sense to me.

16 Q. In the middle of the page is there a map?

17 A. Yes.

18 Q. And next to the map, is there an address?

19 Is there an address next to the map?

20 A. Hard to see.

21 Yes.

22 Q. And that address is 21 East 9th Street --

23 A. Yes.

24 Q. -- New York, New York?

25 A. Yes.

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Hasangjikaj - cross

1 Q. Is that the address of Arte Restaurant?

2 A. Yes.

3 Q. And the number below the address, (212) 473-0077?

4 A. Yes.

5 Q. Is that the phone number for Arte Restaurant?

6 A. Yes.

7 Q. Does Arte Restaurant have a Facebook page?

8 A. I believe, kids do, but that doesn't, you know, doesn't
9 answer your question to this because this absolute -- we never
10 open at 4 o'clock. It doesn't match with that. And even
11 though if -- whatever they say, that's a Facebook page, which
12 really doesn't comply with anything that we, we really do. So
13 people can say we open 24 hours, again, they can say. But this
14 is not accurate. It says we work Saturday 4 to 12. It's
15 not -- we never open at 4 o'clock, to begin with. We never,
16 you know, even though people are scheduled, like I mentioned to
17 you, scheduled to work, the ones that work early, they go, you
18 know, they go the latest 9:30, 10 o'clock home. And the ones
19 they come at 5 o'clock, 5:30, they stay till closing. So
20 closing never, never past 10, 10:30, 11 o'clock max. You know,
21 if closing mean by cleaning and leave the restaurant. The only
22 guy who stays there the latest is me.

23 Q. Can you turn to the second page of what's been marked as
24 Plaintiff's P8 for identification. You mentioned earlier next
25 to where it says "hours," does it say Monday through Friday 12

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Hasangjikaj - cross

1 p.m. to 11 p.m.? Yes or no.

2 A. No.

3 Q. What does it say?

4 A. It's 12 to 3. They didn't describe --

5 Q. I'm not asking you what the actual schedule was.

6 A. What exactly is.

7 Q. What it says.

8 A. I can't control the, the, you know --

9 Q. I'm not asking you to, sir. I'm just asking you if that's
10 what the document says.

11 A. I know, but I refuse to answer this question. You know,
12 this makes no sense to me. This is not written by me. This
13 is -- I'll ask just to, you know, let me work through this,
14 because this makes no sense to me, because anybody can write
15 hours, just because they, they don't even know. I mean, those
16 are the kids that they write there, the time.

17 Q. Sir, that's why you have an attorney. If your attorney
18 wants to object, he can. I'm asking you what the hours are on
19 the document that I gave you.

20 A. The document you gave me, it says 12 to 11.

21 Q. And then Saturday 4 p.m. to 12 p.m.?

22 A. It says, yes.

23 Q. And then Sunday from 3 p.m. to 11 p.m.? 11 a.m.?

24 A. Yes, that's what it says.

25 Q. OK. Now I would like you to go to what's been marked for

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Hasangjikaj - cross

1 identification as Plaintiff's P9, which is the Yelp page. It
2 looks like this. The next document.

3 A. OK. You see the mistake here, I didn't hear that part
4 because I can't -- you see, also this another one. 11 a.m. Is
5 that -- do you follow here? This makes sense to you? It's 3
6 to 11 a.m.

7 MR. KUMAR: Your Honor, if you -- my apologies.

8 Q. Sir, if you would like to clean something up or any part of
9 your testimony, that's what your lawyer can come up here and
10 ask questions. You don't have to ask -- answer any more
11 questions about that document.

12 Can we go to the next page, Plaintiff's P9

13 A. This is done.

14 Q. Can you go to the next document I gave you.

15 A. This document you mean?

16 Q. The next one. Not the next page, the next document.

17 The next document, sir.

18 THE COURT: You're referring to Plaintiff's Exhibit P9
19 for identification purposes, Mr. Kumar?

20 MR. KUMAR: Yes, your Honor.

21 THE COURT: Thank you. Proceed.

22 Q. On the top left-hand side, does it say "Arte Restaurant"?

23 MR. STRAND: I renew my objection to all use of these
24 documents.

25 THE COURT: On the basis that they were not in the

G6RACAJ3ps

Hasangjikaj - cross

1 joint pretrial order?

2 MR. STRAND: Yes, your Honor.

3 THE COURT: Thank you. Overruled. Proceed.

4 Q. Sir, on the top left-hand corner, does it say "Arte
5 Restaurant"?

6 A. Yes.

7 Q. Below that, there is a map.

8 A. I see that.

9 Q. Underneath the map, there is an address, 21 East 9th
10 Street, New York, New York, 10003. Is that correct?

11 A. Yes.

12 Q. Is that the address for Arte Restaurant?

13 A. Yes.

14 Q. Below that there's a phone number, (212) 473-0077; is that
15 correct?

16 A. Yes.

17 Q. Is that the phone number for Arte Restaurant?

18 A. Yes.

19 Q. On the right-hand side, there's a column that says "hours."
20 Is that correct?

21 Bottom right-hand side.

22 A. Right-hand side.

23 Q. Right.

24 A. Yes.

25 Q. Underneath the hours, it says "Monday, 12 p.m. to 11 p.m."

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Hasangjikaj - cross

1 is that what this document says?

2 MR. STRAND: Objection again on pretrial order and
3 hearsay.

4 THE COURT: Thank you. With respect to the objection
5 on the basis that this is a document that was not included in
6 the pretrial order, I am not sustaining that objection. These
7 documents are being offered for impeachment purposes.

8 Now, neither of these documents is in evidence, and so
9 to the extent that the request is for Mr. Hasangjikaj to
10 provide testimony regarding the content of these documents,
11 neither is in evidence, and as a result I'll sustain that
12 objection, to the extent that the objection is to ask
13 Mr. Hasangjikaj to testify as to the content of a document that
14 is not in evidence and that has not been authenticated.

15 MR. STRAND: Thank you, your Honor. I move to strike
16 all testimony regarding these documents.

17 THE COURT: Thank you. Denied. I'm sustaining your
18 most recent objection.

19 MR. KUMAR: I'll move on, your Honor.

20 THE COURT: Thank you.

21 MR. KUMAR: No more questions for this witness, your
22 Honor.

23 THE COURT: Thank you very much.

24 Mr. Strand, do you have any questions for
25 Mr. Hasangjikaj?

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Hasangjikaaj - redirect

1 MR. STRAND: Yes, I do, on redirect. Thank you, your
2 Honor.

3 REDIRECT EXAMINATION

4 BY MR. STRAND:

5 Q. Azem, this is what's called redirect testimony, which is in
6 response to cross-examination, and I'm going to state the
7 portions of the cross-examination that I am responding to.

8 Beginning with when you described Segundo as an independent
9 contractor, is he paid on a W-2, if you know, or on a 1099?

10 A. Both, 1099 and W-2.

11 Q. He gets both.

12 A. Yes.

13 Q. Just clarifying the terminology there.

14 Now, when they said, regarding written records of the
15 shifts worked, can you just clarify, were written records kept
16 of the shifts worked?

17 A. We have the schedule of the days that he worked. That's
18 what the agreement was. The schedule of his days that he
19 worked. We also made sure that he -- he doesn't exceed the
20 time, you know, because of his history in the past, you know.
21 He lives on the, you know, the train station. This guy waits
22 for them to sue the restaurants and they make our lives
23 miserable. You know, that's what it is. You know, this guy's
24 agreement for him to get paid \$700. And I don't know how to
25 explain that. Hours, five hours, six hours, three hours, he

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Hasangjikaj - redirect

1 got paid \$700. And he did not exceed this time.

2 Q. Sure. Thank you.

3 You were asked about, do you feel the -- well, let me
4 ask that differently. How accurate are these documents as to
5 whether or not they show whether the plaintiff worked overtime?

6 A. They are accurate.

7 Q. So they accurately show that he did not work overtime?

8 A. Mostly, yeah, you know. I know what's going on. I'm there
9 every day.

10 Q. Sure. And when you were asked about the payroll taxes,
11 which I didn't think was relevant, but are any payroll taxes
12 taken out on a 1099?

13 A. Yes.

14 No, no, no. No. From 1099, no.

15 Q. Are payroll taxes paid on a W-2?

16 A. Yeah. At the end of the year.

17 Q. So when you are asked whether or not payroll taxes were
18 probably taken out on a 1099, the answer is, no, because there
19 are no payroll taxes on a 1099. Correct?

20 A. Yes.

21 Q. Thank you. That's a little bit leading --

22 A. No, no, no.

23 Q. -- but to be clear on the tax laws.

24 You do not personally supervise any social media pages
25 for the restaurant, do you? Like Yelp and Facebook.

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1 A. Can you repeat that again?

2 Q. You don't manage a Facebook page for the restaurant.

3 A. No, I don't.

4 Q. Do you, to your knowledge, do you know of anyone at the
5 restaurant who does?

6 A. The workers probably do, the ones that have a Facebook, but
7 that doesn't mean it's accurate information. Maybe the
8 address, the thing, but, I mean, to me this doesn't make any
9 sense that you, you know, like investigate -- it's there.
10 Their hours are there. I'm not saying something that is not.
11 I'm just saying that, you know, this is -- I'm open for 23
12 years and I'm not faking the hours. So whatever hours worked,
13 he, his schedule was 10 o'clock. You talking about specific
14 guy, who is Luis Cajamarca, his time. He will be changed hours
15 and time. So this is the guy. I don't know what they have on
16 Facebook. I have no idea -- actually everything is wrong there
17 the way they describe, but, you know, I don't manage and I
18 don't know, honest. I have no idea. I don't have time for
19 that. I work seven days.

20 Q. Does that go for the Yelp page as well?

21 Do you manage the Yelp page?

22 A. I do not. I don't manage nothing as far as Internet. I
23 have no idea.

24 Q. Sure. OK.

25 MR. STRAND: All right. I have no further questions.

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1 THE COURT: Thank you very much.

2 Any additional questions on cross-examination for this
3 witness, Mr. Kumar?

4 MR. KUMAR: No, your Honor, no recross.

5 THE COURT: Thank you very much.

6 Thank you very much, Mr. Azem Hasangjikaj. You can
7 stell down. Thank you.

8 THE WITNESS: Thank you.

9 (Witness excused)

10 THE COURT: Mr. Strand, do you have any additional
11 testimony that you would like to present to the Court?

12 MR. STRAND: No, your Honor, I do not. Thank you.

13 THE COURT: Thank you. Do you rest?

14 MR. STRAND: Yes, your Honor, I do.

15 THE COURT: Thank you very much.

16 Thank you, counsel. The case is now submitted. Let's
17 turn to closing arguments.

18 MR. KUMAR: Prior to closing, plaintiff has several
19 applications that he would like to make to the Court.

20 THE COURT: Thank you. Proceed.

21 MR. KUMAR: Specifically, plaintiff would like --

22 THE COURT: You can step down, Mr. Hasangjikaj. Thank
23 you very much.

24 MR. HASANGJIKAJ: Thank you, your Honor.

25 MR. KUMAR: Your Honor, could I move to the lectern?

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1 THE COURT: Please do.

2 MR. KUMAR: Your Honor, plaintiff requests an adverse
3 inference against the defendants and each of them concerning
4 the plaintiff's schedule throughout his employment with the
5 defendants. Specifically, the defendants failed to call Mr.
6 Hasangjikaj's daughter and Vilson Brulha, whose duty it was, as
7 defendants stated, to keep track of the hours that the
8 plaintiff worked. Both of these people were directly under the
9 defendant's control and have material information regarding
10 Mr. Cajamarca's actual schedule. Therefore the plaintiff
11 requests an adverse inference that, because neither of these
12 people were called, that they would actually bolster
13 Mr. Cajamarca's testimony regarding his schedule.

14 THE COURT: Thank you. Let me hear from you, please,
15 Mr. Strand.

16 MR. STRAND: I object to that. I think that that's
17 something that probably belongs in closing argument. I don't
18 know much law on that matter and would at least like an
19 opportunity to brief it. To me this goes to argument. And if
20 we're going to have adverse inferences, I would like an adverse
21 inference based on his spouse. But to me that's something to
22 be addressed in closing argument. I mean --

23 THE COURT: Thank you. Let me take up this issue.
24 First, Mr. Kumar, do I understand you correctly that you wish
25 for the Court to draw an adverse inference from the fact that

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1 the defendant did not choose to call those two witnesses at
2 trial; is that correct?

3 MR. KUMAR: Yes, your Honor.

4 THE COURT: Is there any other basis for the request?

5 MR. KUMAR: Defendant's daughter was not on the Rule
6 26 disclosures, but that's the only basis, your Honor.

7 THE COURT: Thank you. Was there any reason why those
8 witnesses, having presumably been disclosed to you during -- in
9 the 26(a) disclosures, you did not subpoena?

10 MR. KUMAR: Mr. Brulha, when we tried to schedule his
11 deposition, defendants waived calling him at trial today. I
12 did not subpoena either of those defendants, your Honor --
13 either of those parties.

14 THE COURT: Thank you. The request for me to draw an
15 inverse inference as a result of the failure by one side to
16 call a particular set of witnesses at trial is denied. Both
17 parties have subpoena power, and plaintiffs could also have
18 called those witnesses if you wished to. Mr. Strand's decision
19 not to call those witnesses does not, I believe, justify the
20 Court's entry of a, quote, adverse inference, close quote, as a
21 result of his decision not to call particular witnesses.

22 Proceed.

23 MR. KUMAR: That's it, your Honor.

24 THE COURT: Thank you very much.

25 MR. KUMAR: Thank you.

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Summation - Mr. Kumar

1 THE COURT: Let's turn now to closing arguments if we
2 can. I will hear first from plaintiff. Then I will hear from
3 defendant. Then I will have a short rebuttal for plaintiff.
4 But I would net that the rebuttal should be a rebuttal, not an
5 additional closing statement.

6 MR. KUMAR: Understood, your Honor.

7 THE COURT: Proceed.

8 MR. KUMAR: When I opened earlier today, I said this
9 case, like all HR cases, were ultimately about fairness. Now
10 is the time for the Court to implement that idea through the
11 burden-shifting framework that has been espoused by the Supreme
12 Court in *Anderson v. Mt. Clemens Pottery Company*. I'm sure the
13 Court is familiar with the framework, so I won't go over it.
14 Instead, I would like to begin with the defendants' only time
15 records.

16 Now, what the defendants have given in this action to
17 defend themselves against Mr. Cajamarca's accusations, the
18 first page of Defendant's A, labeled "weekly schedule," is a
19 single sheet of paper which has checks and Xs on it. On the
20 stand, the one defense witness stated that that is not how they
21 actually kept their records for the plaintiff or anybody else,
22 and that that specific sheet was created after Mr. Cajamarca
23 actually worked there.

24 The plaintiff's name isn't listed anywhere on that
25 document. It's undated. And even if what the defendants state

1 was true, that the way they kept their records were by checks
2 and Xs, that single document doesn't have a lunch shift,
3 doesn't have a dinner shift, like the defendants have claimed
4 how they keep their records.

5 The rest of Defendant's Exhibit A consists of payroll
6 records. According to these payroll records, my client worked
7 exactly 40 hours per week, every week, the entire time he
8 worked for the defendant. Defendants themselves have stated
9 that he actually did not work 40 hours per week every week.
10 And these documents also show that my client -- pardon me. Not
11 only did the defendants state that my client didn't work 40
12 hours per week every week; they said that that's just how they
13 entered the documents into their payroll system for the sake of
14 simplicity.

15 Further, defendants have admitted that the gross wages
16 on the payroll records are also incorrect. In his direct
17 testimony, as well as on cross, defendants have stated that the
18 client -- my client, Mr. Cajamarca, actually received a net
19 payment of \$700 per week, not the \$450 listed on the remaining
20 pages of Defendant's Exhibit A.

21 Through their own admission and the documents before
22 the Court, the defendants have shown that they have not
23 produced adequate and accurate pay records for Mr. Cajamarca.
24 None of the records show the exact number of hours that
25 Mr. Cajamarca worked or the exact amount that he was paid. Due

1 to this failure, Mr. Cajamarca is forced to rely on his own
2 best recollections of the amount he was paid and the amount of
3 hours that he worked. How do you do this? He testified today
4 and was subject to cross-examination by the defendants. He
5 testified that he began working for the defendants on April 25,
6 2014. He testified that he was a pasta man and his duties were
7 making pasta and breaded meats. Importantly, he also testified
8 that, according to his best recollections, he worked Tuesdays
9 and Thursdays from 11:30 a.m. until 10 p.m., Fridays and
10 Saturdays he worked from 3:30 p.m. till 12 a.m., and Sundays he
11 worked from 3:30 p.m. until 10 p.m. That totals to 44 1/2
12 hours per week.

13 He also testified that he was paid a net salary of
14 \$700 per week. Defendants readily admit that he was paid that
15 set salary and that salary did not change through the pendency
16 of his employment.

17 And finally, Mr. Cajamarca testified that he was
18 terminated on September 10, 2015.

19 Now, in order to rebut the plaintiff's testimony in
20 this action, the defendants called one witness,
21 Mr. Hasangjikaj, who comes to work every day at 4 p.m., every
22 day, seven days a week. He did not call Mr. Vilson Brulha, who
23 he testified is in charge of keeping track of when the
24 employees come in. Nor did he call his daughter, who is also
25 in charge, as she opens up the restaurant. Instead of having

1 someone with knowledge testify to these material facts,
2 defendants rely solely on Mr. Hasangjikaj's testifying. What
3 did he actually testify to? He testified that he himself did
4 not arrive at Arte until 4 p.m. every day, hours after
5 Mr. Cajamarca's shift actually started. He testified that
6 Mr. Cajamarca was paid a salary. He testified that
7 Mr. Cajamarca worked between five and six days per week, but
8 he's not sure how many days per week he actually worked. And
9 he testified that he didn't pay payroll taxes on part of
10 Mr. Cajamarca's salary.

11 Lastly, he testified to the hours of Arte Restaurant,
12 but read aloud from both the Facebook page and a Yelp page that
13 show that Arte Restaurant was opened approximately one or two
14 hours later than what he testified to.

15 (Continued on next page)

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Summation - Mr. Strand

1 MR. KUMAR: In this scenario, with these facts and
2 documents before the Court, the defendants cannot be said to
3 have carried their burden of rebutting the plaintiff's best
4 recollections. Therefore, the plaintiff asks the Court what in
5 fairness he deserves from the defendants, namely, that the
6 Court finds that each of the defendants violated the Fair Labor
7 Standards Act and the New York Labor Law and give damages to
8 the plaintiff of \$8,505 in unpaid overtime wages, \$1,207.50 in
9 unpaid spread of hours wages, \$8,505 in federal liquidated
10 damages, \$9,712.50 in New York State liquidated damages,
11 prejudgment interest on Mr. Cajamarca's spread of hours claims,
12 and, finally, attorneys' fees and costs, as well as any other
13 relief that the Court finds just, proper, and, of course, fair.
14 Thank you.

15 THE COURT: Thank you, counsel.

16 Mr. Strand, closing argument.

17 MR. STRAND: Thank you, your Honor.

18 31 words. That's what this case comes down to, is the
19 31 words in No. 16 of the direct testimony of this plaintiff.
20 That's sort of the genu block, if you will, on all of this
21 standing, and it's quite frankly an incredibly flimsy genu
22 block.

23 And the issue in this case, first and foremost, is
24 whether or not you believe this 31 words of uncorroborated
25 self-serving testimony. And in the context of that here are

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Summation - Mr. Strand

1 some questions I think we should ask ourselves.

2 Question No. 1: Why is this testimony so vague? You
3 can see that when you compare it to Mr. Hasangjikaj's
4 testimony. Mr. Hasangjikaj talked about the meal break, talked
5 about the food they cooked, talked about the seasonal
6 fluctuations. It's a little slower in the summertime. Talked
7 about all these things. There is a dinner shift, there is a
8 lunch shift. This paragraph 16 from the plaintiff, it's so
9 vague and the lack of details to me makes it unbelievable,
10 especially compared to the detailed testimony which he was
11 cross-examined on and repeated with very high consistency, so
12 that's the first thing.

13 Now, everybody agrees that this restaurant opens at
14 noon. In fact, opposing counsel even showed those hours in my
15 client's face. This plaintiff claims he started work at 11:30,
16 and I could see maybe sometimes a cook might need to get there
17 early, like slice peppers or something or maybe a buffet, we
18 need to make the bourbon chicken earlier. It's not even
19 addressed. And I don't understand why a pasta cooker -- this
20 is a sitdown Italian restaurant. A pasta cooker would cook to
21 order spaghetti for someone who comes in for lunch. I don't
22 see why he needed to get there 30 minutes before opening.
23 Could there be an explanation? Maybe. But it is completely
24 not even touched on here. That's an important thing.

25 Same thing with closing time. The closing time -- I

1 forget if this was in the direct testimony or not, but the
2 restaurant has a bar within it. And so we might be confusing
3 kitchen and food closing time with bar closing time. Anyway,
4 those records, those social media offered by opposing counsel,
5 are just as inconsistent with the plaintiff's testimony.

6 Now, the plaintiff said he worked in this kitchen
7 until midnight. This is an Italian restaurant in Greenwich
8 Village. Who orders spaghetti at 11:30? I could see where a
9 diner might have a food crowd that late or maybe a fast food
10 place. I moved here from New Orleans. We had some 24-hour
11 burger joints in the French Quarter. It does not make sense.
12 Mr. Hasangjikaj's testimony makes sense. The 4 p.m. to 5 p.m.
13 break to eat a dinner makes sense when you think about
14 restaurants. Human gastronomy. Is that the right word? I'm
15 just a simple man. As far as the no fluctuation at all that
16 the plaintiff testified to, I don't buy that. Everybody knows
17 things fluctuate sometimes, schedules change.

18 And as far as the question I asked about subway train,
19 I did a little experiment and I did not know how it was going
20 to turn out. This plaintiff claims he worked the exact same
21 schedule for a year and a half and that he took the No. 7 train
22 and transferred to the N and the Q. If he worked the exact
23 same schedule, he should darn know well what time he left if he
24 left home the same times for a year and a half. And he had no
25 clue. If he's making these hours up or fudging them, then he

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Summation - Mr. Strand

1 should have a good answer, which he did not. My experiment
2 panned out. I used the scientific method. I tested a
3 hypothesis. I think that testimony is important. Question No.
4 1, why such vague testimony.

5 Now, question No. 2, I suppose, is, what do these
6 records say? I would like to point out, yes, the records don't
7 record the exact start time, the exact end time. But there is
8 a record and there is testimony about the records. And I think
9 that shows Mr. Hasangjikaj's honesty. It would not have been
10 that hard to cook up some bogus spreadsheets. He chose to be
11 honest and turn over what we actually had. They do keep track.
12 They don't record the exact minute, but that's not required
13 under federal regulations. That's question No. 2.

14 Now, the plaintiff doesn't dispute that he got pay
15 stubs. If these pay stubs -- and that there were records, if
16 he said 40 and he was working overtime every single week for a
17 year and a half and he didn't say anything, I don't buy it. I
18 don't buy it at all. I don't believe a word that this
19 plaintiff says. That's question No. 2, what do the records
20 say. And I think it's important that we can infer some
21 reliability from Mr. Hasangjikaj in that he chose to be honest
22 and turn over the real records. We did not fudge them. We
23 were honest and we disclosed what we really had. Precise time
24 is not the same as time.

25 Question No. 3. We have got our three questions.

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Summation - Mr. Strand

1 Question No. 1 is why such vague. Question No. 2 is what the
2 records say. Question No. 3, why does he qualify his
3 statement. He starts it with, and I'm in paragraph 16:
4 According to my best recollections. He is not even certain.
5 He wants this Court to be certain enough to sign a judgment for
6 God knows how much money, and he is not even willing to say
7 definitively. Mr. Hasangjikaj did say definitively repeatedly,
8 on direct, on cross, he told the same story. I think that's
9 the important question, you know. Why the need to put in this
10 escape hatch language or to the best of my knowledge. It
11 reminds me of one -- how do you tell if lawyers are lying?
12 Their lips are moving. When people put in phrases like, to the
13 best of my knowledge or, as I recall. That's question No. 3.

14 Question No. 4, why is there a lack of corroboration
15 here. I mentioned this a little bit in the brief. Surely, he
16 had someone with him who you could have attested to the hours
17 he worked, when he left, when he got home. And he said he
18 didn't have a bank account, but his spouse did. I don't know
19 that this is as strong. But he said he took the subway. How
20 did he take the subway? You use a MetroCard. What happens
21 when your card runs out? You pull out your wallet, or I use my
22 Gulf Coast Bank card, you refill the card. That should create
23 evidence. I guess it's not impossible if he always paid cash
24 for it. I don't know if you can. Maybe. It's another issue,
25 the lack of corroboration. Often people use smart phones, they

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1 use texting. They say, I'm about to get off work. He might
2 have sent an e-mail or a Facebook post. And there is just
3 nothing like that. And this evidence would exist if he was
4 telling the truth, I submit. Anyway, that's question No. 4.

5 No. 5, why, after -- I guess it was 23 years. I
6 apologize. I said 30 in the opening. 23 years. Why after 23
7 years did this restaurant start to become shysters. 23 years
8 without a complaint. And all of a sudden they say, we aren't
9 paying people for overtime. I don't buy it. Which is more
10 likely, that all of a sudden a restaurant decides to do wrong
11 by its employees, or that one employee, after getting fired,
12 decides to get greedy. I submit the latter is the more
13 reasonable inference.

14 Anyway, question No. 6 is, what are the incentives to
15 be dishonest here? I can see there is incentives to be
16 dishonest on both sides, but I think we have to recognize that
17 this is a lawsuit, there is money riding on this. There is an
18 incentive to stretch the truth because you get money by
19 stretching the truth. That is something to consider. Those
20 are my six questions to ask ourselves.

21 Now, let me talk a little bit about the law and
22 *Anderson* and some of these wonderful labor cases which we will
23 talk about. Opposing counsel said in his brief that there is a
24 presumption that the plaintiff is correct in a case like this,
25 and that is absolutely wrong. That is not what any court has

1 said about it. The word presumption does not appear in the
2 *Anderson v. Mt. Clemens Pottery*. To understand that ruling
3 let's talk a little bit about the facts of that case.

4 Now, in *Anderson* what happened was, you had this
5 factory and they were punching cards. And what happened was
6 the factory was shortchanging them on the hours. If you came
7 in at 6:46 at this factory and punched your card at 6:46, you
8 were credited for 7. They rounded it down. And if you left at
9 12:14, you were credited for leaving at 12. They were
10 shortchanging them by the hours. When they were sued, this
11 factory, as the weasels they were, said, we don't know how
12 much, so you can't prove anything, so nana nana nana. I don't
13 how you notate that on the script, but anyway.

14 The Supreme Court said no. We can use just a
15 reasonable inference. That is the standard. It does not mean
16 the recollection is presumed to be correct. And there are many
17 examples of that in the cases. The plaintiff still needs to
18 demonstrate by a just and reasonable inference that what he
19 says is true.

20 Now, the courts have said I guess it's possible, based
21 on recollection, but they do not say that the recollection is
22 presumptively true, especially when we are talking about 31
23 words of wishy-washy testimony and that's all he has to say
24 about it. Not addressing the seasons, not addressing the fact
25 that he was working while the restaurant was closed. It's

1 debatable whether the standard of *Mt. Clemens* applies here.

2 But I don't think this plaintiff's testimony meets it.

3 And just for another example. A case that was cited
4 was the *Doo Nam Yang* case. I think it was a sewing machine
5 worker. If you read that decision you see that the testimony
6 was corroborated. Mr. Yang's employer agreed, yes, he started
7 at 7, so they didn't just take his word for it. They were
8 maybe a little more generous in their extrapolating of what
9 Mr. Yang's hours were, but they didn't say, 31 words, we got
10 it, let's go home. There is more of a burden of proof than
11 that. I read the standard under this *Mt. Clemens* case as not
12 high, but I think it's higher than 31 words, higher than that.

13 Anyway, that's my response to these arguments that the
14 plaintiff is presumptively correct. All he has to do is come
15 in here and say 31 words which are qualified. I am not sure.
16 And without any corroboration, which are very vague and which
17 are highly questionable, given his inability to answer about
18 the subway or to explain why he was working when the restaurant
19 was closed.

20 Anyway, the other issues I think I addressed mostly in
21 my memorandum as for the causes of action. I'll just close by
22 summarizing by questions. 1. Why such vague testimony. Why
23 does it not address these things. And is that believable.
24 Does it address why he was working when the restaurant was
25 closed. Since it didn't fluctuate at all. I don't buy that at

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Summation - Mr. Strand

1 all. Work shifts change, restaurants fluctuate.

2 Mr. Hasangjikaj's testimony on this is believable, is credible.

3 Question No. 2. What do the records say. I think
4 regardless whether the Court wants to consider these records
5 accurate enough, there is some semblance of records here. They
6 kept track of shifts and it shows Mr. Hasangjikaj's honesty.
7 That's question 2.

8 Question 3. Why does he need to qualify his
9 statement. Why does he put the escape language in here. He is
10 not even sure. He wants to be sure. He is not sure.

11 Question 4. Why is there a lack of corroboration. I
12 just got attacked for not calling more witnesses. I feel one
13 is enough. I think this plaintiff's testimony is clearly
14 insufficient. Why didn't he call someone else. Same thing.
15 And he has the initial burden here.

16 And question 5, why did this restaurant suddenly
17 decide to shortchange somebody after 23 years without a
18 problem.

19 With respect to the last question, the incentive to
20 lie, Mr. Kumar began both his opening statement and his closing
21 argument with a discussion of fairness and the policy purposes
22 of the Fair Labor Standards Act, which I had a fun time
23 learning about. I really don't do labor law. I'm a tax
24 lawyer. I had fun with this case. And I also think when we
25 are looking at the policies of law, such as the Fair Labor

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Rebuttal - Mr. Kumar

1 Standards Act, which is a beloved piece of legislation. It has
2 done a lot of good.

3 I think one of the biggest enemies of laws designed to
4 help people, like minimum wage, like welfare, like Medicaid,
5 things like that, I think one of the biggest enemies of those
6 is abuse, when people take the generosity afforded by these
7 things and abuse them. And the Fair Labor Standards Act cases
8 create a generous standard of proof for some plaintiffs.
9 *Anderson v. Mt. Clemens*. But we need to be careful that we
10 don't let this generosity get abused.

11 The Fair Labor Standards Act allows for attorneys'
12 fees and allows for costs, liquidated damages. And I think
13 it's important to recognize that when these things get abused,
14 whether it's by welfare claims or greedy lawyers or whatever,
15 that it engenders dislike for the system. I think nothing
16 would serve the policies of the Fair Labor Standards Act more
17 than rightfully holding that this plaintiff is not credible,
18 his testimony is not sufficient. I do not believe a word he
19 says and neither, your Honor, should this Court. Thank you.

20 THE COURT: Thank you, Mr. Strand.

21 Any rebuttal, Mr. Kumar?

22 MR. KUMAR: Short one, your Honor.

23 THE COURT: Thank you.

24 MR. KUMAR: Mr. Strand goes on and on about various
25 questions that Mr. Cajamarca failed to answer. What he fails

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Rebuttal - Mr. Kumar

1 to say, though, is that the defendants have the burden of
2 keeping accurate and adequate records so that Mr. Cajamarca
3 would not have to rely on his best recollections. He worked
4 from 2014 to 2015 and, to the best of his knowledge, is what he
5 testified here to today.

6 Why so vague? It's been approximately a year since he
7 last worked there. He has probably had several jobs in
8 between. But that's not something that this Court should
9 punish the plaintiff for. *Anderson v. Mt. Clemens* is designed
10 to help plaintiffs in this exact position.

11 Where the defendants do not have adequate or accurate
12 records, the plaintiffs cannot be held responsible for not
13 remembering exactly when they came in or exactly when they
14 left. The Second Circuit has also said that the plaintiff can
15 make his burden using his recollection alone, in *Kuebel v.*
16 *Black & Decker*.

17 As to what do the records say, it's correct, we don't
18 actually know what the records say. What the defendants have
19 said is Mr. Cajamarca didn't work exactly 40 hours, but that's
20 what the records say. They have records that show a weekly
21 schedule that might have been created after Mr. Cajamarca left.
22 They have no records of even the shifts that they claim
23 Mr. Cajamarca actually worked.

24 As for the qualifying language, you are right, he said
25 it to the best of his recollection, which is all he can do. If

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Rebuttal - Mr. Kumar

1 the defendants had kept adequate and accurate records, we
2 wouldn't even be having this discussion. And the plaintiff's
3 lack of corroboration. Maybe he paid for his MetroCard in cash
4 every time. He said he didn't have a bank account. Again, the
5 burden was on the defendants to come forth with these records.
6 So he would have to come forward with this corroboration.

7 And the defendants mentioned something interesting.
8 After 23 years, this is the first time the defendants have been
9 sued. Now, I don't know why the defendants have not been sued
10 before. Even a short look at their records show that they
11 didn't keep adequate or accurate time records. But we don't
12 know whether or not they settled out of court or whether they
13 had an arbitration process in place prior to Mr. Cajamarca
14 coming in. We don't know whether or not before he terminated
15 other employees he had them sign general releases so they
16 couldn't sue him before.

17 Lastly, the incentives to be dishonest. Defendants
18 talk about this at length and although they say that the
19 plaintiff has incentives to be dishonest in that he would get a
20 damage award, they failed to say what the incentives of their
21 dishonesty could be, meaning they won't have to pay someone
22 they have refused or failed to pay overtime to. This incentive
23 should work both ways.

24 The defendant, although while being subject to
25 cross-examination, he is angry. He doesn't like the fact that

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1 he's being sued, but that doesn't automatically make him
2 honest. The only people that actually know the hours that
3 plaintiff worked in this case are Mr. Cajamarca and maybe two
4 other people that have not been called as witnesses at all. No
5 records show the exact number of hours. No records show the
6 exact amount of pay. Defendants have failed in their burden,
7 and we ask that the Court give the plaintiff damages as
8 requested in closing.

9 THE COURT: Thank you very much. Thank you all for
10 your presentations of evidence and argument. As I said
11 previously, the case is fully submitted. I've heard your
12 arguments. I am going to take a recess now, not adjourn, take
13 a recess until 2 p.m., at which time we will reconvene this
14 matter to discuss what will happen next. I will see you all
15 back here at 2 p.m. promptly. Thank you.

16 (Recess)

17 (Continued on next page)

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Decision

1 THE COURT: Thank you all for reconvening here now. I
2 am going to issue my decision now. This decision is
3 approximately 12 pages, single spaced, in length, so please be
4 patient as I review this. I think it will be appropriate for
5 me to resolve this matter promptly.

6 I. Overview. Plaintiff Luis Cajamarca brings this
7 lawsuit under the Fair Labor Standards Act and New York Labor
8 Law claiming that he is owed compensation for: (1) unpaid
9 overtime under the FLSA; (2) unpaid overtime under the New York
10 Labor Law; and (3) unpaid spread of hours pay under the New
11 York Labor Law.

12 I am going to incorporate most of my relevant findings
13 of fact into my detailed analysis of the defendants' liability.
14 I would, however, first like to find some basic facts so that
15 they are established as a baseline for the remainder of my
16 decision.

17 Plaintiff Luis Cajamarca was employed as a cook by
18 Yerina Restaurant Corporation, which does business as Arte
19 Restaurant, from April 25, 2014 to September 10, 2015. Arte
20 Restaurant is an Italian restaurant located at 21 East 9th
21 Street, New York, New York, 10003.

22 Arte Restaurant (which I will refer to as "the
23 restaurant") had gross receipts of \$500,000 or more each year
24 from 2012 through 2015, inclusive. The restaurant served beer
25 and wine and other products that were moved in interstate

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Decision

1 commerce, and Mr. Cajamarca handled such goods in the course of
2 his employment.

3 During the course of his employment at Arte
4 Restaurant, Mr. Cajamarca was paid \$700 each week.
5 Mr. Cajamarca was paid by a combination of check and cash.
6 Each week he would receive an envelope that contained cash, a
7 check, and a pay stub. The pay stubs did not state a rate of
8 pay or the number of hours Mr. Cajamarca worked, and they
9 stated that his gross pay was \$450 per week and his net pay was
10 \$390 per week.

11 Defendant Azem Hasangjikaj is the president and sole
12 owner of Yerina Restaurant Corporation and the manager of Arte
13 Restaurant. Mr. Hasangjikaj told Mr. Cajamarca what tasks
14 Mr. Cajamarca needed to perform and explained his work duties
15 to him, had the power to alter Mr. Cajamarca's work schedule by
16 giving him the day off, and paid Mr. Cajamarca.
17 Mr. Hasangjikaj also hired and fired Mr. Cajamarca.

18 II. Liability. Defendants do not dispute that Yerina
19 Restaurant Corporation and Mr. Hasangjikaj were Mr. Cajamarca's
20 employers. The facts that I just outlined, coupled with the
21 law that I am about to explain, make clear that those two
22 defendants are liable as employers under the FLSA and New York
23 Labor Law. I find myself forced to conclude that Mr. Calle is
24 also liable as an employer, but as I will describe, the
25 question of defendant Segundo Calle's liability, while clearly

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1 established on this record, as presented by counsel, is
2 somewhat more fraught.

3 The FLSA imposes liability on the "employer" of any
4 employee who is subjected to the employer's violations of the
5 FLSA's overtime provisions. See 29 U.S.C. § 216(b). The term
6 "employer" "includes any person acting directly or indirectly
7 in the interest of an employer in relation to an employee." 29
8 U.S.C. § 203(d). The Supreme Court "has instructed that the
9 determination of whether an employer-employee relationship
10 exists for purposes of the FLSA should be grounded in 'economic
11 reality rather than technical concepts,' determined by
12 reference not to 'isolated factors, but rather upon the
13 circumstances of the whole activity.'" *Barfield v. New York*
14 *City Health & Hospitals Corp.*, 537 F.3d 132, 141 (2d Cir. 2008)
15 (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28,
16 33 (1961) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722,
17 730 (1947)).

18 An entity may be considered an employer based on its
19 exercise of either "formal control" or "functional control."
20 *Barfield*, 537 F.3d at 141-43. And, under certain
21 circumstances, an individual within a company may be held
22 personally liable under the FLSA as an employer. See *Inclan v.*
23 *New York Hospitality Group, Inc.*, 12-cv-4498 (NRB), 2015 WL
24 1399599, at *13 (S.D.N.Y. Mar. 26, 2015) (citing *Irizarry v.*
25 *Catsimatidis*, 722 F.3d 99, 105 (2d Cir. 2013)). "When it comes

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1 to 'employer' status under the FLSA, *control is key.*" *Glatt*,
2 293 F.R.D. at 525 (internal quotation marks omitted) (emphasis
3 added). The Second Circuit has adopted a four-factor test to
4 measure formal control: "whether the alleged employer (1) had
5 the power to hire and fire employees, (2) supervised and
6 controlled employee work schedules or conditions of employment,
7 (3) determined the rate and method of payment, and (4)
8 maintained employment records." *Carter v. Dutchess Community*
9 *College*, 735 F.2d 8, 12 (2d Cir. 1984) (internal quotation
10 marks omitted). Although the *Carter* factors are sufficient to
11 establish employment status, a positive finding on all four
12 factors is not necessary to establish employment status -- the
13 Circuit has emphasized that in determining whether an
14 employer-employee relationship exists, courts must consider
15 "the totality of the circumstances" and avoid the "mechanical
16 application" of any set of factors. *Barfield*, 537 F.3d at 143.

17 The Second Circuit has "emphasiz[ed] two particular
18 areas of inquiry for cases involving individual defendants
19 alleged to be FLSA employers." *Inclan*, 2015 WL 1399599, at
20 *14. The first inquiry concerns "the scope of an individual's
21 authority or 'operational control' over a company," and the
22 second inquiry concerns "hypothetical versus actual power."
23 *Irizarry*, 722 F.3d at 106. Under the first inquiry, "an
24 individual defendant must possess control over a company's
25 actual 'operations' in a manner that relates to a plaintiff's

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1 employment." *Irizarry*, 722 F.3d at 109. "Some degree of
2 individual involvement in a company in a manner that affects
3 employment-related factors such as workplace conditions and
4 operations, personnel, or compensation" is required for an
5 individual to be considered an employer. *Id.* Under the second
6 inquiry, operational control "need not be exercised constantly
7 for an individual to be liable and you the FLSA." *Irizarry*,
8 722 F.3d at 110.

9 Defendants, in their pretrial memorandum of law, argue
10 that Mr. Calle is a "senior cook," without any authority to
11 hire, fire, or pay employees. In their answer, however,
12 defendants admitted that Mr. Calle is "a principal, officer,
13 and/or manager" of Arte Restaurant (Compl. ¶ 6), that he had
14 the power to hire and fire employees (Compl. ¶¶ 23 and 24),
15 that he could tell Mr. Cajamarca what tasks to complete,
16 control Mr. Cajamarca's work schedule, and control the rate and
17 method of Mr. Cajamarca's pay (Compl. ¶¶ 25, 26, and 27), and
18 that Mr. Calle "acted as plaintiff's employer within the
19 meaning of the FLSA and the New York State labor law"
20 (Compl. ¶ 31; Defendants' Answer ¶ 1).

21 "A party's assertion of fact in a pleading is a
22 judicial admission by which it normally is bound throughout the
23 course of the proceeding." *Bellefonte Re Ins. Co. v. Argonaut*
24 *Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (citations omitted);
25 see also *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d

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120, 123 (2d Cir. 1984) ("Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the court."). Courts may, however, disregard a stipulation "if to accept it would be manifestly unjust or if the evidence contrary to the stipulation is substantial." *PPX Enterprises*, 746 F.2d at 123 (quoting *Loftin and Woodard, Inc. v. United States*, 577 F.2d 1206, 1232 (5th Cir. 1978) (internal quotation marks omitted)); see also *Interglobo Customs Broker, Inc. v. Herschel Imports, Inc.*, No. 14-cv-4995 (KNF), 2015 WL 3756799, at *9 (S.D.N.Y. June 5, 2015) (applying the same manifest injustice/substantial evidence standard to admissions made in pleadings and permitting a defendant to amend its answer where the court found "a substantial basis exists...to have a concern regarding the amount [of money owed] admitted by defendant in its answer").

In addition to the admission in the answer, Mr. Cajamarca has testified that Mr. Calle supervised his day-to-day activities and told him which tasks to complete and the order in which they should be completed, and Mr. Calle testified that he could hire employees (see the Calle deposition 19:14-20: 15), and that he set the kitchen workers' schedule (see the Calle deposition 24:6-24:9).

Candidly, I have real qualms about finding that Mr. Calle, who did not testify today, acted as an employer within the meaning of the FLSA and New York Labor Law. That is

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1 because Mr. Strand has argued in his written submissions that
2 Mr. Calle was merely a cook. But while Mr. Strand has
3 presented that argument, he has not supported his argument with
4 sufficient evidence. In particular, I do not have a sufficient
5 basis to disregard the binding judicial admission made by
6 Mr. Strand on behalf of defendants that Mr. Calle was
7 plaintiff's employer. In order for me to disregard that
8 admission, I would need to be presented with "substantial"
9 evidence on the record to the contrary. I do not have
10 substantial evidence to the contrary on this record; I have
11 Mr. Strand's argument, which suggests that there may have been
12 an error in the admission, but I do not have sufficient
13 evidence to do anything but accept Mr. Calle's admission. As a
14 result, I must rule on the basis of Mr. Calle's admission.
15 Mr. Calle is represented by counsel in this litigation, who
16 filed and signed the answer, presumably in compliance with his
17 Rule 11 obligations. Defendant Calle "voluntarily chose this
18 attorney as his representative in the action, and he cannot now
19 avoid the consequences of the acts or omissions of this freely
20 selected agent." *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34
21 (1962). "Any other notion would be wholly inconsistent with
22 our system of representative litigation, in which each party is
23 deemed bound by the acts of his lawyer-agent and is considered
24 to have 'notice of all facts, notice of which can be charged
25 upon the attorney.'" *Id.* at 634 (quoting *Smith v. Ayer*, 101

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1 U.S. 320, 326 (1879)). Simply put, at the outset of this
2 litigation, Mr. Strand admitted that Mr. Calle was
3 Mr. Cajamarca's employer, and has provided me no basis to
4 disregard that admission. If that was an error, the cost will
5 fall on Mr. Strand's client, Mr. Calle. I cannot change the
6 facts presented to me at trial.

7 Therefore, I find that all three defendants are
8 employers within the meaning of the FLSA and New York Labor
9 Law, and are liable for any violations of those statutes.

10 III. Overtime. The FLSA embodies "a uniform national
11 policy of guaranteeing compensation for all work or employment
12 engaged in by employees covered by the Act." *Tenn. Coal, Iron*
13 *& R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944).
14 The FLSA provides that any employee who works more than 40
15 hours in a week is entitled to overtime pay for those hours in
16 excess of 40, at a rate "not less than one and one half times
17 the regular rate at which he is employed." 29 U.S.C.
18 § 207(a)(1). The same is true under the regulations
19 implementing the New York Labor Law for hospitality workers
20 such as Mr. Cajamarca. See N.Y. Regulations, Title 12, Section
21 146-1.4.

22 The New York Labor Law "is the state analogue to the
23 federal FLSA." Thus, except for where they differ -- as I will
24 outline shortly -- "[c]ourts apply the same analysis for FLSA
25 and [NYLL] overtime claims..." *Alvarez v. Michael Anthony*

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1 *George Const. Corp.*, 15 F.Supp. 3rd 285, 291 (E.D.N.Y. 2014)
2 (internal citations and alterations omitted); see also *Kuebel*
3 *v. Black & Decker, Inc.*, 643 F.3d 352, 357 n.2 (2d Cir. 2011).

4 a. Recordkeeping Requirements. The FLSA requires
5 employers to "make, keep, and preserve" records of their
6 employees' "wages, hours, and other conditions and practices of
7 employment." 29 U.S.C. § 211(c); see also 29 C.F.R.
8 § 516.2(a). Payroll records must be retained by employers for
9 a minimum of three years, and all other records must be
10 retained for a minimum of two years. See 29 C.F.R. 516.5(a),
11 516.6. These recordkeeping and retention requirements "are not
12 mere technicalities, but substantive obligations that are
13 'fundamental underpinnings' of the FLSA and critical to
14 ensuring the statute's effectiveness." *Amaya v. Superior Tile*
15 *& Granite Corp.*, 10-cv-4525 (PGG), 2012 WL 130425, at *6
16 (S.D.N.Y. Jan. 17, 2012) (quoting *Wirtz v. Mississippi*
17 *Publishers Corp.*, 364 F.2d 603, 607 (5th Cir. 1966)).

18 b. The Supreme Court's Burden-Shifting Test. An
19 employee suing his employer for unpaid overtime "has the burden
20 of proving that he performed work for which he was not properly
21 compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.
22 680, 687 (1946). He must also prove "that the employer had
23 actual or constructive knowledge of that work." *Kuebel*, 643
24 F.3d at 361.

25 In cases like this, courts use a burden-shifting test

1 set out by the Supreme Court in *Mt. Clemens*. 328 U.S. at
2 687-88. The test does not presume that an employee's testimony
3 is credible; rather, the test recognizes that "it is the
4 employer who has the duty under bracket [the FLSA] to keep
5 proper records of wages, hours, and other conditions and
6 practices of employment and who is in a position to know and
7 produce the most probative facts concerning the nature and
8 amount of work performed." *Id.* Under this burden-shifting
9 test, where an employer's records are inaccurate or inadequate,
10 "an employee has carried out his burden if he proves that he
11 has in fact performed work for which he was improperly
12 compensated and if he produces sufficient evidence to show the
13 amount and extent of that work as a matter of just and
14 reasonable inference. The burden then shifts to the employer
15 to come forward with evidence of the precise amount of work
16 performed or with evidence to negative the reasonableness of
17 the inference to be drawn from the employee's evidence. If the
18 employer fails to produce such evidence, the court may then
19 award damages to the employee, even though the result be only
20 approximate." *Id.* at 687-88.

21 First, I find that defendants' records for the hours
22 Mr. Cajamarca worked are both inaccurate and inadequate.
23 Mr. Cajamarca's pay stubs did not record his hours worked and
24 were an admittedly inaccurate statement of the amount he was
25 paid. The time records offered by defendants are also

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1 inaccurate in both the hours worked and pay reflected. The
2 records offered by defendants as Exhibit A show that
3 Mr. Cajamarca was paid \$450 for all but one week that he worked
4 at Arte Restaurant -- for some unexplained reason, the week of
5 June 19, 2014 he was paid \$375. The records also claim that
6 Mr. Cajamarca worked exactly 40 hours each and every week. The
7 party disagree on many things in this lawsuit, but one thing
8 they both strenuously argue is that Mr. Cajamarca did not work
9 40 hours per week. According to Mr. Cajamarca he worked more;
10 according to defendants he worked less. In even
11 Mr. Hasangjikaj's version of events, the time records presented
12 by defendants were intentionally inaccurate.

13 In addition, the checklist schedule provided by
14 defendants as part of Exhibit A is entirely irrelevant to this
15 litigation. It is undated, and Mr. Cajamarca's name does not
16 appear on it. Mr. Hasangjikaj testified today that this
17 document was created after Mr. Cajamarca's employment at Arte
18 Restaurant ended. I don't see the bearing that it has on the
19 number of hours that he may have worked during the period of
20 his employment, and it cannot by any stretch of the imagination
21 be considered to be an accurate or adequate record for purposes
22 of this litigation. As emphasized during Mr. Kumar's
23 cross-examination, it does not show even evidence that the
24 restaurant uses shifts for lunch and dinner. It merely
25 provides a daily statement of each week's schedule, without

1 reference to lunch or dinner shifts.

2 Because I find that defendants' records are inaccurate
3 and inadequate, the test in *Mt. Clemens* applies, and
4 Mr. Cajamarca carries his burden if he proves that he in fact
5 performed work for which he was improperly compensated and if
6 he produces sufficient evidence to show the amount and extent
7 of that work as a matter of just and reasonable inference. See
8 *Mt. Clemens*, 328 U.S. at 687.

9 i. Determining hours worked. An employee may meet
10 his burden of providing evidence sufficient "to show the amount
11 and extent of the uncompensated work as a matter of just and
12 reasonable inference" through "estimates based on his own
13 recollection." *Kuebel*, 643 F.3d at 362 (collecting cases). An
14 employee has met his burden when he presents credible testimony
15 and the defendants "fail[] to cast sufficient doubt on
16 plaintiff's recollection of his hours." *Doo Nam Yang v. ACBL*
17 *Corp.*, 427 F. Supp. 2d 327, 337 (S.D.N.Y. 2005) (Sand, J.).
18 While courts frequently find support for an employee's
19 testimony through corroborating evidence, such as the testimony
20 of the employer-defendants, see, e.g., *YU G. Ke v. Saigon*
21 *Grill, Inc.*, 595 F.Supp.2d 240, 251-52 (S.D.N.Y. 2008), or the
22 employer's records, see, e.g., *Alvarez v. Michael Anthony*
23 *George Const. Corp.*, 15 F.Supp. 3rd 285, 291, n.2, 292-93
24 (E.D.N.Y. 2014) -- contrary to Mr. Strand's suggestion, there
25 is no obligation for an employee to bolster otherwise credible

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1 testimony with corroborating evidence in order to make out a
2 claim.

3 I find that Mr. Cajamarca has met his burden. Through
4 his credible testimony, he offered evidence that proved that he
5 performed work for which he was not properly compensated.
6 Mr. Cajamarca's testimony, moreover, is corroborated on several
7 important points by defendants' evidence -- they agree that
8 Mr. Cajamarca was paid \$700 per week, that he was paid in a
9 combination of cash and check, that the payroll records are
10 inaccurate, and that Mr. Cajamarca's weekly schedule was "one
11 to two lunches per week and four to five dinners per week,"
12 which is consistent with Mr. Cajamarca's recollection that he
13 regularly worked lunch on Tuesday and Thursday and dinner on
14 Tuesday, Thursday, Friday, Saturday, and Sunday.

15 The point on which the parties disagree is whether
16 Mr. Cajamarca worked 44.5 hours per week, as he claimed -- that
17 is, from 11:30 to 10 p.m. on Tuesday and Thursday, 3:30 p.m. to
18 12 a.m. on Friday and Saturday, and 3:30 to 10 p.m. on
19 Sunday -- or something less, as defendants' claim. according
20 to Mr. Cajamarca, he worked this schedule with a 15- to
21 20-minute break for him to eat each day, and when he was
22 required to stay later than his usual schedule he was not given
23 additional pay.

24 Defendants disagree, claiming that on days when
25 Mr. Cajamarca worked both lunch and dinner he was not working

1 between 3 or 4, when the lunch shift ended, and 5:00 p.m., when
2 the dinner shift began. Mr. Hasangjikaj also testified that
3 Mr. Cajamarca frequently left work 30 to 60 minutes before the
4 scheduled end of the shift. But defendants did not produce
5 credible evidence showing the precise amount of work performed
6 by Mr. Cajamarca. In fact, as just discussed, none of the
7 records they produced showed even close to a "precise"
8 measurement of the work performed by plaintiff. In addition,
9 Mr. Hasangjikaj's recollection of the hours worked by
10 Mr. Cajamarca is not clear -- he remembers that Mr. Cajamarca
11 worked one to two lunch shifts per week, that they were each
12 three to four hours long, and four to five dinner shifts that
13 were each five to six hours long, so that by his calculation
14 Mr. Cajamarca worked between 24 and 35 hours each week. But
15 while Mr. Hasangjikaj testified that Mr. Cajamarca "never"
16 worked more than 40 hours in a week, he cannot testify with any
17 certainty as to what his schedule actually was, his worked
18 schedule actually was, and does not have the records that he is
19 statutorily obligated to keep to support his assertion.

20 Mr. Hasangjikaj's selective memory makes it difficult
21 for me to fully credit his testimony. He does not remember the
22 plaintiff's schedule precisely.

23 Let me make one semantic point here briefly. That is
24 the difference between schedule, i.e. posted schedule of the
25 period in which somebody might work and the hours that someone

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1 actually worked. So when I say that he does not remember the
2 plaintiff's schedule precisely, I am not saying that he does
3 not remember his shifts. I am saying that he does not remember
4 the hours that the plaintiff worked on any given day or week or
5 month precisely. The one fact that he recalls with complete
6 clarity regarding the plaintiff's schedule, understood in that
7 same way -- namely, that he never worked more than 40 hours --
8 is the one fact that, coincidentally, exculpates him from
9 liability. Facing liability, Mr. Hasangjikaj has a personal
10 interest in testifying to the facts that he has, and I discount
11 his testimony as a result. I also discredit his testimony
12 because of the manner in which he maintained time records for
13 all of his workers. Those records were undeniably false. I
14 understand Mr. Hasangjikaj argues that they were intentionally
15 false but done in order to overstate his hours. The fact
16 remains that, for whatever reason, Mr. Hasangjikaj
17 intentionally presented employees' time records inaccurately.
18 That causes me to discredit his testimony regarding the actual
19 hours worked by his employees. I simply do not find it
20 credible that he consistently reported that his employees
21 worked 40 hours each week, if in fact they consistently worked
22 considerably less than the amount of time, as he claims.

23 Moreover, I do not find it credible that a cook, as he
24 has testified to, at a restaurant, never began work before the
25 restaurant opened to patrons. If Arte Restaurant was going to

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1 begin serving dinner at 5 p.m., common sense dictates, to me at
2 least, that it is more likely that Mr. Cajamarca was required
3 to arrive and begin work sooner, as he testified, rather than
4 at 5 p.m., when customers would begin to arrive, or might begin
5 to arrive. He was involved in the preparation of food for
6 diners, after all. Mr. Hasangjikaj's version of events would
7 have me believe that the chef began working at the same time as
8 customers began to enter the restaurant, without time to
9 prepare himself, his workstation, or food that customers might
10 order. I find that to be less credible than plaintiff's
11 account.

12 I also note that while defense counsel has repeatedly
13 argued that Arte Restaurant has never been accused of
14 underpaying its employees prior to this lawsuit, that there is
15 no evidence before me that supports that assertion. As counsel
16 should know, arguments of counsel are not evidence; and I
17 cannot afford this unsubstantiated argument any weight in my
18 decision.

19 Lastly, defendants' suggestion that "if the plaintiff
20 really did work the hours he claimed" there would be evidence
21 such as "a time-coded credit card purchase when he refilled his
22 MetroCard to take the subway home after work, or time-stamped
23 messages from the plaintiff's mobile device stating that he was
24 just leaving work." Defs.' Br. 7. Such conjecture, seeking to
25 inappropriately place the burden on the plaintiff, is precisely

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1 the why the Supreme Court articulated the burden-shifting test
2 in *Mt. Clemens*. It is the employer, not the employee, who is
3 obligated by law to keep accurate records of the time worked.
4 And "where the employer's records are inaccurate or
5 inadequate," the solution "is not to penalize the employee on
6 the ground that he is unable to prove the precise extent of the
7 uncompensated work" because "[s]uch a result would...allow the
8 employer to keep the benefits of an employee's labors without
9 paying due compensation." *Mt. Clemens*, 328 U.S. at 687.

10 I have to comment briefly as well on the assumptions
11 implicit in this argument, namely, that Mr. Cajamarca has a
12 credit card, that he has a smartphone with unlimited text
13 capacity. Both of those assumptions are unsubstantiated on the
14 evidence before me on the record. If anything, the only actual
15 testimony presented, namely, that Mr. Cajamarca did not have a
16 bank account, go against the assumption that he should also
17 have a credit card. While a lawyer might be expected to have
18 credit card records and text messages from his or her
19 cellphone, I'm not so sure that these arguments are well placed
20 in the context of Mr. Cajamarca.

21 In sum, having observed the testimony in court today,
22 I find Mr. Cajamarca's testimony to be credible. As I said, I
23 note that it is corroborated by defendants on a number of
24 points, and with respect to the numbers of hours worked, I find
25 Mr. Cajamarca's testimony to be more credible than

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1 Mr. Hasangjikaj's testimony.

2 Although neither of the parties addressed this point
3 in their pretrial memoranda or their arguments today, I would
4 like to briefly discuss whether Mr. Cajamarca is owed
5 compensation for the meal breaks. Mr. Cajamarca has testified
6 that he had a 15- to 20-minute break to eat each day. Under
7 the FLSA, "[b]ona fide meal periods are not work time" for
8 which an employee must be paid, but rest breaks -- also
9 referred to as coffee breaks or snack breaks -- are counted as
10 compensable time. 29 C.F.R. Section 785.18-19. The
11 regulations describe rest breaks as from five to 20 minutes
12 long, while bona fide meal breaks are "[o]rdinarily 30 minutes
13 or more," although "under special conditions" they may be
14 shorter. 29 C.F.R. Section 785.19(a). "The reasons for the
15 temporal distinction is that a shorter break is deemed to
16 predominantly benefit the employer by giving the company a
17 reenergized employee." *Naylor v. Securiguard*, 801 F.3d 501,
18 505 (5th Cir. 2015) (citing 29 C.F.R. § 785.18).

19 For the reasons that I just discussed, I credit
20 Mr. Cajamarca's testimony that his meal break was 15 to 20
21 minutes long, and I do not credit Mr. Hasangjikaj's testimony
22 that his employees were given a full hour for a meal break. In
23 this case there is no evidence of any special circumstances
24 that would turn a compensable 15-minute rest break into a
25 noncompensable bona fide meal break. Therefore I find that

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1 Mr. Cajamarca worked 44.5 compensable hours per week.

2 Having determined that Mr. Cajamarca was not properly
3 compensated for all of the hours worked, I must now determine
4 his regular rate of pay and the appropriate damages.

5 ii. Determining an Employee's "Regular Rate" and
6 Applicable Overtime Compensation.

7 1. Regular Rate Under the FLSA. Under the FLSA, an
8 employee's regular rate "refers to the hourly rate actually
9 paid the employee for the normal, non-overtime workweek for
10 which he is employed." *Walling v. Youngerman-Reynolds Hardwood*
11 *Co.*, 325 U.S. 419, 424 (1945); see also 29 U.S.C. § 207(e).
12 "The regular rate by its very nature must reflect all payments
13 which the parties have agreed shall be received regularly
14 during the workweek exclusive of overtime payments. It is not
15 an arbitrary label chosen by the parties; it is an actual
16 fact." *Walling*, 325 U.S. at 424. But where employees are paid
17 a daily or weekly salary, as Mr. Cajamarca was, "[i]n order to
18 evaluate an employer's FLSA compliance, wages must be expressed
19 in terms of a regular hourly rate." *Adams v. Dep't of Juvenile*
20 *Justice*, 143 F.3d 61, 66 (2d Cir. 1998).

21 Under the FLSA, "[t]here is a rebuttable presumption
22 that a weekly salary covers 40 hours; the employer can rebut
23 the presumption by showing an employer-employee agreement that
24 the salary cover a different number of hours." *Giles v. City*
25 *of New York*, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999) (emphasis

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1 added). But "[u]nless the contracting parties intend and
2 understand the weekly salary to include overtime hours at the
3 premium rate, courts do not deem weekly salaries to include
4 overtime premium for workers regularly logging overtime." *Id.*
5 (collecting cases). I am to construe the FLSA overtime
6 provisions broadly and, as Judge Motley said in *Giles*, "a
7 finding that a salary included overtime, in the absence of
8 *proof of an agreement so stating*, would be the sort of 'narrow,
9 grudging' FLSA application that the [Supreme] Court rejected
10 soon after enactment." *Id.* (emphasis added) (quoting *Tenn.*
11 *Coal, Iron & R.R. Co., et al.*, 321 U.S. 590, 597 (1944)).

12 Such an agreement must be express or explicit. *See,*
13 *e.g., Giles*, 41 F. Supp. 2d at 317, *Amaya v. Superior Tile &*
14 *Granite Corp.*, No. 10-cv 4525 (PGG), 212 WL 130425, at *9
15 (S.D.N.Y. Jan. 17, 2012). "In the absence of any written
16 instrument memorializing the parties' intention, the Court must
17 infer the terms of their agreement from the entire course of
18 their conduct based on the testimonial and documentary evidence
19 in the record." *Moon v. Kwon*, 248 F. Supp. 2d 201, 206
20 (S.D.N.Y. 2002). And "[e]ven when wages exceed the minimum
21 prescribed by Congress, the parties to the contract must
22 respect the statutory policy of requiring the employer to pay
23 one and one half times the regular hourly rate for all hours
24 actually worked in excess of 40." *Adams*, 143 F.3d at 67-68
25 (quoting *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42

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1 (1944)).

2 I find that there was no express agreement between
3 Mr. Cajamarca and defendants that the weekly salary was meant
4 to compensate Mr. Cajamarca for overtime work. Mr. Cajamarca
5 testified that he was never told, at the time he was hired or
6 any later date, that his weekly salary was supposed to cover
7 any overtime premium. And defendants have not provided any
8 evidence of an express agreement contradicting Mr. Cajamarca's
9 testimony. Therefore, the FLSA's presumption that a weekly
10 salary covers 40 hours is applicable here.

11 2. Regular Rate Under the New York Labor Law.

12 Prior to January 1, 2011, restaurant employees in New
13 York could be paid a weekly salary, instead of being paid an
14 hourly rate. Beginning January 1, 2011, however, labor
15 regulations for restaurant workers require that employees be
16 paid hourly: "[e]mployers *may not* pay employees on a daily,
17 weekly, salary, piece rate or other non-hourly rate basis."
18 N.Y. Regulations, Title 12, Section 146-2.5 (emphasis added).
19 The regulations then provide that: "If an employer fails to pay
20 an employee an hourly rate of pay, the employee's regular
21 hourly rate of pay shall be calculated by dividing the
22 employee's total weekly earnings, not including exclusions from
23 the regular rate, by the lesser of 40 hours or the actual
24 number of hours worked by that employee during the
25 workweek." N.Y. Regulations, Title 12, Section 146-2.5. Thus,

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1 under the New York Labor Law, like the FLSA, the regular rate
2 of pay is calculated by dividing an employee's total weekly
3 salary by 40. This calculation of the "regular rate" is then
4 used to determine an employee's applicable overtime rate of
5 "1 1/2 times the employee's regular rate for hours worked in
6 excess of 40 hours in one workweek." N.Y. Regulations, Title
7 12, Section 146-1.4.

8 Because I have found that Mr. Cajamarca worked 44.5
9 hours per week, his regular rate is calculated by dividing his
10 weekly salary of \$700 by 40 to obtain a regular hourly rate of
11 \$17.50. His overtime rate is \$17.50 times 1.5, which is
12 \$26.25.

13 I calculate Mr. Cajamarca's overtime damages to be
14 \$8,505, which is 72 weeks without overtime times 4.5 hours per
15 week overtime times \$26.25. That equals \$8,505.

16 IV. Spread of hours.

17 In New York, a restaurant employee is entitled to an
18 extra hour's pay at the basic minimum wage rate on each day he
19 works for which "the spread of hours exceeds 10." N.Y.
20 Regulations, Title 12, Section 146-1.6 (and Section 137-1.7 for
21 years prior to 2011). "The spread of hours is the length of
22 the interval between the beginning and end of an employee's
23 workday," and "includes working time plus time off for meals
24 plus intervals off duty." *Id.* For example, Title 12 Section
25 146-1.6 gives the example of an employee who works from 11:30

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1 a.m. to 3 p.m. and then again from 4 p.m. to 10 p.m. Although
2 only nine and a half hours were worked during that workday, the
3 spread of hours is ten and a half, and the employee would be
4 entitled to spread of hours pay. *Id.*

5 Prior to 2011, a restaurant employee was entitled to
6 an extra hour's pay at the basic minimum hourly rate "in
7 addition to the minimum wages otherwise required" on each day
8 he worked for which the spread of hours exceeded ten hours.
9 *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234,
10 241-42 (2d Cir. 2011) (quoting N.Y. Regulations, Title 12,
11 Section 137-1.7).

12 Courts in this circuit have adopted the New York
13 Department of Labor's position that the plain language of the
14 pre-2011 spread of hours position indicates that it does not
15 apply to workers whose compensation is already sufficiently
16 above the minimum wage rate. See N.Y.S. Dep't of Labor opinion
17 letter dated March 16, 2017, file no. RO-07-0009, at 2,
18 available at [https://labor.ny.gov/legal/counsel/pdf/Minimum%20](https://labor.ny.gov/legal/counsel/pdf/Minimum%20Orders/RO-07-0009A.pdf)
19 [Orders/RO-07-0009A.pdf](https://labor.ny.gov/legal/counsel/pdf/Minimum%20Orders/RO-07-0009A.pdf). See, e.g., *Martinez v. Hilton Hotels*
20 *Corp.*, 930 F. Supp. 2d 508, 531 (S.D.N.Y. 2013); *Flores v.*
21 *Anjost Corp.*, 284F F.R.D. 112, 118-19 (S.D.N.Y. 2012); *Zubair*
22 *v. EnTech Eng'g P.C.*, 808 F. Supp. 2d 592, 601 (S.D.N.Y. 2011).

23 However, as of January 1, 2011, restaurant employees
24 are entitled to such supplemental wages "regardless of a given
25 employee's regular rate of pay." N.Y. Regulations, Title 12,

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1 Section 146-1.6. Therefore, even a restaurant employee who is
2 paid substantially more than the minimum wage is entitled to
3 spread of hours compensation, where applicable, for workdays
4 occurring after January 1, 2011. See *Martinez v. Hilton Hotels*
5 *Corp.*, 930 F. Supp. 2d 508, 531-32 (S.D.N.Y. 2013) (citing N.Y.
6 Regulations, Title 12, Section 146-1.6).

7 Defense counsel, in his memorandum of law, asks that
8 the Court find that plaintiff was not entitled to spread of
9 hours pay for two reasons: first, because Mr. Cajamarca never
10 worked a shift of more than ten hours, and, second, because the
11 New York Labor Law -- according to defense counsel -- only
12 requires payment of minimum wage plus an additional hour at
13 minimum wage and Mr. Cajamarca was already compensated beyond
14 the applicable minimum wage rates. See Defs.' Proposed
15 Conclusions of Law ¶ 2.

16 With respect to the first point, as I have just
17 explained, the law makes it very clear -- to the point of
18 providing an example of a hypothetical employee whose
19 hypothetical hours are quite similar to Mr. Cajamarca's -- that
20 the length of a shift is irrelevant for spread of hours pay.
21 What matters is the time the employee first begins work and the
22 time he finally concludes his work on a given day.

23 With respect to defense counsel's second point,
24 counsel clearly ended his research before learning that the
25 spread of hours minimum wage rule was no longer effective as of

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1 January 1, 2011. Mr. Cajamarca was employed by Arte Restaurant
2 during 2014 and 2015, and so is entitled to spread of hours pay
3 despite the fact that his regular rate was well above minimum
4 wage.

5 Between April 25, 2014 and September 10, 2015,
6 Mr. Cajamarca worked from 11:30 a.m. to 10:00 p.m. on Tuesdays
7 and Thursdays, and is entitled to spread of hours compensation
8 for those workdays. I calculate Mr. Cajamarca's total spread
9 of hours damages at \$1,207.50.

10 I calculate that as follows: 35 weeks in 2014 times
11 two days per week times \$8 minimum wage per 12 NYCRR
12 146-1.2(a)(2) equals \$560; 37 weeks in 2015 times two days per
13 week times \$8.75 minimum wage per 12 NYCRR 146-1.2(a)(3) equals
14 \$647.50. The sum of those two numbers is \$1,207.50.

15 V. Liquidated Damages.

16 a. FLSA Liquidated Damages. Employees are also
17 entitled to liquidated damages under the FLSA in an amount
18 equal to their unpaid wages, unless "the employer shows to the
19 satisfaction of the court that [his] act or omission...was in
20 good faith and that he had reasonable grounds for believing
21 that his act or omission was not a violation of the Fair Labor
22 Standards Act." 29 U.S.C. § 260; *see also* 29 U.S.C. § 216(b).
23 Liquidated damages under the FLSA are not imposed as a penalty
24 but as "compensation to the employee occasioned by the delay in
25 receiving wages caused by the employer's violation of the

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1 FLSA." *McLean v. Garage Management Corp.*, no. 10-cv-3950
2 (DLC), 2012 WL 1358739, at *5 (S.D.N.Y. April 19, 2012)
3 (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d
4 Cir. 1999)); see also *Overnight Motor Transportation Co. v.*
5 *Missel*, 316 U.S. 572, 583 (1942).

6 Defendants may *only* avoid liquidated damages under the
7 FLSA if they demonstrate that they "acted in subjective good
8 faith with objectively reasonable grounds for believing that
9 [their] acts or omissions did not violate the FLSA." *Barfield*
10 *v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 150
11 (2d Cir. 2008); see also 29 U.S.C. § 260. Defendants' burden
12 in this regard is high: "[t]o establish the requisite
13 subjective good faith, an employer must show that it took
14 active steps to ascertain the dictates of the FLSA and then
15 act[ed] to comply with them." *McLean*, 2012 WL 1358739, at *5
16 (quoting *Barfield*, 537 F.3d at 150). In cases such as this
17 one, "double damages bracket [are] the norm and single damages
18 the exception." *Id.* (quoting *Herman*, 172 F.3d at 142).

19 I find that the defendants did not meet their burden.
20 They did not establish that they took active steps to ascertain
21 the dictates of the FLSA and then acted to comply with them.
22 In fact, they did not even offer evidence attempting to show
23 that they acted in subjective good faith.

24 Mr. Cajamarca is therefore entitled to FLSA liquidated
25 damages in the amount of his unpaid overtime wages, \$8,505.

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1 b. NYLL Liquidated Damages. Employees may also
2 recover liquidated damages under the New York Labor Law.
3 Similar to the FLSA, employees are entitled to liquidated
4 damages under the New York Labor Law "unless the employer
5 proves a good faith basis to believe that its underpayment of
6 wages was in compliance with the law." N.Y. Lab. Law
7 § 198(1-a). For any New York Labor Law violations after April
8 9, 2011, plaintiffs are entitled to 100 percent of the amount
9 of their unpaid wages. New York Lab. Law §§ 198(1-a), 663(1).

10 c. Denial of Cumulative, or Stacked, Liquidated
11 Damages. "There is no appellate authority as to whether a
12 plaintiff may recover cumulative (sometimes called
13 'simultaneous' or 'stacked') liquidated damages under the FLSA
14 and NYLL, and the district courts in this Circuit are deeply
15 divided." *Inclan v. New York Hospitality Group, Inc.*, 95
16 F.Supp. 3d 490, 505 (S.D.N.Y. 2015). Plaintiff urges the
17 Court to award cumulative liquidated damages under both of the
18 statutes, arguing that because liquidated damages under the
19 FLSA are compensatory, while under the NYLL they are punitive,
20 he is entitled to both. Multiple district courts in this
21 circuit have so held. *See Hernandez v. Jrpac, Inc.*,
22 No. 14-cv-4176 (PAE), 2016 WL 3248493 at *34 (S.D.N.Y. June 9,
23 2016) (collecting cases); and *Inclan*, 95 F. Supp. 3d at 505
24 (same). The distinction between the purposes of the two
25 statutes, however, was premised on the New York Labor Law's

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1 requirement that an employee establish that an employer's
2 violation was willful in order to be entitled to liquidated
3 damages. *Hernandez* 2016 WL 3248493, at *34.

4 As plaintiff acknowledges (see Pl.'s Pretrial Mem. of
5 Law at 9), in 2009 the New York Labor Law was amended to, among
6 other things, change the burden of proof required to establish
7 a claim for liquidated damages. Prior to the 2009 amendments,
8 the New York Labor Law required an employee to show that his
9 employer's violation was "willful" in order to collect
10 liquidated damages under the New York Labor Law; in addition,
11 prior to the amendments, the employee could only recover 25
12 percent of his unpaid wages as liquidated damages. *Id.* The
13 2009 amendments to the New York Labor Law created a burden of
14 proof akin to the that of the FLSA -- the statute no longer
15 requires a showing that the violation was willful. Instead, an
16 employee is now entitled to liquidated damages "except where
17 the employer demonstrates good faith," and may recover 100
18 percent of the wages owed as liquidated damages. *Id.* (citing
19 2010 N.Y. Sess. Law Ch. 564 (S. 8380) and 2009 N.Y. Sess. Law
20 Ch. 372 (A. 6963)).

21 As my colleague, Judge Engelmayer, recently explained,
22 "in light of the convergence that the amendments effect between
23 the New York Labor Law's and the FLSA's liquidated damages
24 provisions...the earlier distinction between the FLSA's
25 compensatory provision and the New York Labor Law's punitive

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1 provision" is now "elusive." In light of the elimination of
2 the "willfulness" requirement from the New York Labor Law in
3 the 2009 amendments, I find it difficult to conclude that
4 liquidated damages under the New York Labor Law are "punitive"
5 rather than merely compensatory. As a result, this Court now
6 joins the courts in this district that have held that, after
7 the 2009 amendments to the New York Labor Law, permitting
8 stacked liquidated damages would amount to an impermissible
9 double recovery. *See Id.* (collecting cases); *see also Inclan*,
10 99 F.Supp. 3d 490 (2015) (holding that "the recent amendments
11 to the New York Labor Law have undermined the basis" for a
12 distinction between the two statutes).

13 Because Mr. Cajamarca is entitled to liquidated
14 damages for his unpaid overtime wages damages under the FLSA,
15 he cannot also recover liquidated damages for unpaid overtime
16 under the New York lay law. He may, however, collect
17 liquidated damages for his unpaid spread of hours wages under
18 the New York Labor Law. Therefore, Mr. Cajamarca is entitled
19 to New York Labor Law liquidated damages in the amount of
20 \$1,207.50 for unpaid spread of hours pay.

21 VI. Other Awards.

22 a. Pre-Judgment Interest.

23 Under New York law, prejudgment interest -- like both
24 FLSA and New York Labor Law liquidated damages awards -- is
25 compensatory. *See J. D'Addario & Co. v. Embassy Indus., Inc.*,

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20 N.Y.3d 113, 117 (2012) ("The principle behind prejudgment interest is that the breaching party should compensate the wronged party for the loss of use of the money.") thus, plaintiffs cannot recover prejudgment interest in addition to liquidated damages. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715 (1945) ("To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages rising from delay in the payment of the basic minimum wages.").

Therefore, I will not award Mr. Cajamarca prejudgment interest.

b. Costs and Attorney's Fees.

Both the FLSA and New York Labor Law allow prevailing plaintiffs to recover costs and reasonable attorney's fees. See 29 U.S.C. § 216(b); New York Lab. Law § 663(1). Plaintiff therefore may recover both costs and reasonable attorney's fees.

Now, for the foregoing reasons, judgment will be entered in favor of Mr. Cajamarca in the total amount of \$19,425, and costs and attorney's fees in an amount to be determined later.

Counsel, I am now going to set a schedule for submission of applications for attorney's fees and costs. Mr. Kumar, by when can you submit your application for fees and

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1 costs?

2 MR. KUMAR: Three or four weeks, your Honor.

3 THE COURT: Thank you.

4 Mr. Strand, I'm going to propose to set July 18 as the
5 deadline for Mr. Cajamarca's application for attorney's fees
6 and costs. Is that acceptable to you?

7 MR. STRAND: Yes, your Honor.

8 THE COURT: Thank you.

9 Mr. Cajamarca's application for attorney's fees and
10 costs will be submitted no later than July 18, 2016.
11 Defendants' opposition, if any, to the application for fees and
12 costs is due two weeks after service of plaintiff's
13 application.

14 That concludes my decision in this matter. Is there
15 anything else that we should discuss before we adjourn this
16 trial? Mr. Kumar?

17 MR. KUMAR: Yes, your Honor. I was wondering if there
18 would be a chance for me to reply to defendants' opposition to
19 Mr. Cajamarca's application for attorney's fees and costs.

20 THE COURT: Thank you very much. I appreciate you
21 raising that. Yes, you may. Any reply will be due no later
22 than one week following service of the opposition.

23 MR. KUMAR: Thank you, your Honor.

24 THE COURT: Thank you.

25 Anything else from counsel for defendants?

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1 MR. STRAND: No, thank you, Judge.

2 THE COURT: Thank you very much.

3 Good. Thank you all for your arguments, factual
4 presentation here today. I would provide comments on trial
5 practice here, but I will do that at a separate time.

6 Good. Is there anything else we should discuss?

7 Seeing none...

8 MR. KUMAR: Nothing from the plaintiff, your Honor.

9 THE COURT: Thank you very much. This proceeding is
10 adjourned.

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PLAINTIFF EXHIBITS

Exhibit No.	Received
P714

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